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APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, ET. AL.,
PETITIONERS,

—v.—

WILLIAM S. RITCHIE, COMMISSIONER,
STATE ROAD COMMISSION OF THE STATE OF
WEST VIRGINIA, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1970
CERTIORARI GRANTED DECEMBER 21, 1970

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P. E. Carpenter—
Direct 413a
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Robert Bayes—
Direct 429a

United States District Court

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CIVIL ACTION NO. 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA MCLENDON, JUDY ECKLES, HENRY C. HAYNES AND LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES, and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

v.

M. R. HAMILL, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of the Right of Way Division, State Road Commission of the State of West Virginia, ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; ALAN S. BOYD, Individually and as secretary of Transportation of the United States; LOWELL K. BRIDWELL, Individually and as Administrator of the Federal Highway Administration of the United States and FRANCIS C. TURNER, Individually and as Director of the Bureau of Public Roads of the United States.

Relevant Docket Entries

1968

12- 3	Order granting leave to plaintiffs to file and prosecute action without prepayment of costs and directing Clerk to issue summons etc.
12- 3	Filed Complaint
12- 3	Filed Petition to Proceed in Forma Pauperis
12- 3	Filed Affidavit in support of petition to proceed in forma pauperis
12-12	Filed Marshal's returns on summons

1969

1-13	Filed Notice of Motion of U. S. with carbon copy of motion attached and certificate of service
1-20	Filed Motion of defendants, Alan S. Boyd individually and as Secretary of Transportation of U. S., Lowell K. Bridwell, individually and as Administrator of the Federal Highway Administration of U. S. and Francis C. Turner, individually and as Director of Bureau of Public Roads of U. S., for an extension of time to file answer to April 4, 1969.
1-22	Order, time within which above named defendants to answer is extended to and including April 4, 1969
1-27	Order granting M. R. Hamill, Commissioner, State Road Commission of W. Va., and O. R. Colan, Director of Right of Way Division State Road Commission of State of W. Va. extension of time to answer, etc., until April 4, 1969.

Relevant Docket Entries

1969

1–31 Filed motion of City of Charleston, et al, for extension of time to file answer be extended to April 4, 1969.

1–31 Order extending time for defendant, City of Charleston, et al, to file answer to April 4, 1969.

3– 5 Filed pltfs' motion & notice of motion for temporary restraining order.

3– 7 Filed supplemental Notice

3–10 Filed Response of Asst. U. S. Atty. to motion of plaintiffs for a temporary restraining order, with affidavit and certificate of service attached.

3–10 Filed Motion of Asst. U. S. Atty, to quash and suppress, with Notice of motion, certificate of service and Affidavit attached.

3–10 Filed Motion of Asst. U. S. Atty. to dismiss complaint, with Affidavit, exhibits (A thru E, K & O attached; F, G, H, I, J separate), Notice of Motion and certificate of service

3–10 Filed plaintiff's exhibits Nos. 1 thru 9

3–10 Filed response and answer of State Road Commission to plaintiff's motion for temporary restraining order, with exhibits 23 & 24 attached, & exhibits 1 thru 22 and 25 separate

3–10 Filed motion to dismiss on behalf of defendants M. R. Hamill, et al with affidavits attached.

3–10 Filed motion to quash and suppress subpoenaes served upon William S. Ritchie, O. R. Colan, Don Rude, Jack Samples, Joseph S. Jones and M. R. (Cy) Hamill, with affidavits

Relevant Docket Entries

1969

3–10 Filed Motion of defendants Elmer H. Dodson, Mayor, and City of Charleston, to be dismissed as parties defendant

3–13 Filed Notice of Taking of Deposition by pltff.

3–17 Filed motion of U. S. not to depose George L. Hannon until after hearing of 4/1/69, with notice of motion and certificate of service

3–17 Filed motion of defendants, William S. Ritchie, W. Va. State Road Commissioner, et al., to suppress and quash subpoena and motion for protective order under rule 30(b) with notice of motion and certificate of service attached.

3–17 Filed pltff's notice of taking deposition of Joseph S. Jones

3–21 Order, motion to quash subpoena duces tecum served on Geo. L. Hannon sustained; motion for temporary restraining order denied; motion to dismiss City of Charleston denied; hearing on motions to dismiss by various defendants and hearing on evidence on motion for preliminary injunction both set for 4/1/69

3–24 Order quashing notices to take deposition of O. R. Colan, George L. Hannon and Joseph S. Jones in accordance with Rule 30(b) FRCP

3–24 Filed plaintiffs' Motion for Production of Documents by defendant William S. Ritchie, State Road Commissioner with Affidavit of John L. Boettner, Jr. in support of motion

Relevant Docket Entries

1969

3–24 Filed plaintiffs' Motion for Production of Documents by John Volpe, Secretary of Transportation of the United States, and Francis C. Turner, Admr. of the Federal Highway Administration and Acting Director of Bureau of Public Roads of U. S., with Affidavit in support of motion.

3–24 Filed plaintiffs' Motion to Amend Complaint to show Jurisdiction, with certificate of service

3–28 Filed Motion to Quash the Motion for Production of Documents on behalf of U. S.

3–28 Order denying plaintiff's motion to amend complaint

3–29 Filed Motion that plaintiffs be permitted to present all issues and theories of law tendered in their complaint, with certificate of service

4– 1 Filed motion for order directing subpoenas ad testificandum be issued without payment of costs, with affidavit attached.

4– 1 Order directing Clerk to issue subpoenas ad testificandum without payment of costs for persons named in motion

4– 1 Filed plaintiffs' motion for preliminary injunction with affidavits attached.

4– 1 Filed Notice of Appearance of Michael Davidson as an additional counsel for the plaintiffs.

4– 2 Filed Joint & separate answers of Elmer H. Dodson, Mayor of Charleston, et al

Relevant Docket Entries

1969

4– 7 Filed reporter's transcript of proceedings of April 3, 1969 (Court's remarks)

4–23 Order granting plaintiffs additional time in which to submit supplemental memoranda to and including May 5, 1969

4–23 Filed motion of plaintiffs for an extension of time to file supplemental memoranda

4–28 Order, plaintiffs' motion for production of documents denied; motions to quash subpoenas duces tecum served by the plaintiffs granted; motion of plaintiffs for permission to present all issues and theories of law tendered in their complaint, denied.

4–29 Order, motions to dismiss complaint denied, motion for preliminary injunction on behalf of plaintiff denied, and motion to amend to include jurisdiction under Administrative Procedure Act, Title 5, USC 701 et seq. is granted; further ordered that all briefs in support of respective positions be filed on or before April 23, 1969.

5– 5 Filed Answer of defendants John Volpe, individually and as Secretary of Transportation of the United States; Francis C. Turner, individually and as Administrator of the Federal Highway Administration of the United States, and the Acting Director of the Bureau of Public Roads of the United States

5– 8 Filed Answer of Defendants, William S. Ritchie, Jr. Commr. State Road Commission, O. R. Colan, Director of Right of Way Division, State of West Virginia, with certificate of service

Relevant Docket Entries

1969

7– 3 Filed Memorandum Opinion of Court

7–18 Order dismissing case from docket

7–30 Filed Plaintiff's Motion to receive additional evidence and alter or amend findings of fact and judgment or for a new trial.

8–20 Filed plaintiff's exhibit No. C in open Court

8–22 Order denying motions of plaintiffs to alter or amend findings of fact and judgment for new trial

8–25 Filed application of plaintiff for leave to appeal in forma pauperis with affidavit

8–25 Order permitting plaintiff to appeal in forma pauperis, etc.

8–25 Filed plaintiff's Notice of Appeal

8–26 Mailed copies of Notice of Appeal to counsel

9– 2 Filed carbon copy of plaintiff's request for Transcript

9– 5 Mailed photo copy of plaintiff's request for Transcript to counsel of record

9–16 Filed plaintiffs' motion for an injunction pending appeal

9–26 Filed motion of plaintiffs for an extension of time to file record on appeal

9–26 Order granting an extension of time to transmit record on appeal to October 24, 1969

10–13 Filed Stipulation of counsel that Clerk shall temporarily retain record and transcript for use of

1969

parties in preparing appellate papers, pursuant to Rule II(f) of FRAP

10–21 Filed appellant's certification that record, including the transcript and all necessary exhibits is complete for purposes of the appeal.

10–21 Mailed certified copy of stipulation of Oct. 13, appellant's certification of record and docket entries to Clerk, U. S. Court of Appeals at Richmond.

10–24 Filed original copy of Court Reporter's certified transcript of trial to Court on April 2nd and 3rd, 1969.

12–29 Order supplementing order of 8/25/69 by certification of Court that appeal taken by the plaintiffs is not frivolous, etc.

12–29 Mailed certified copy of order to Administrative Office of U.S. Courts.

1970

5–18 Filed Opinion of Fourth Circuit Court of Appeals (judgment of this Court affirmed).

7–29 Filed certified copy of order of Fourth Circuit Court of Appeals staying mandate pending application of appellants in Supreme Court for writ of certiorari.

8– 5 Entered order of Fourth Circuit Court of Appeals rescinding order staying mandate pending application of appellants in Supreme Court for a writ of certiorari.

9– 2 Entered order of U.S. Court of Appeals for the Fourth Circuit (judgment of this Court affirmed).

Complaint

(Title Omitted in Printing.)

Plaintiffs allege as follows:

1. The jurisdiction and authority of this court are invoked under Title 28 U.S.C. §§ 1331(a), 1361, 1343(3) and (4), 2201 and 2202 and Title 42 U.S.C. §§1981, 1982, 1983 and 2000(d), to obtain declaratory judgment and injunctive relief. Plaintiffs contend that the acts of the defendants in planning, adopting and approving the routing simultaneous Interstate Highways I-64 and I-77 through the Triangle District of the City of Charleston, West Virginia, are contrary to the laws and Constitution of the United States.

2. The matter in controversy exceeds $10,000 exclusive of costs and interest and arises under Federal Law as will more fully appear from subsequent paragraphs of this complaint.

3. This is a class action brought by the plaintiffs on behalf of themselves and on behalf of all others similarly affected by the acts of defendants complained of herein. Plaintiffs are citizens of the United States and of the State of West Virginia and all of whom have a personal interest in the particular area of the City of Charleston known as the Triangle. All of the plaintiffs named and represented herein, have a substantial interest in preventing the threatened destruction of or irreparable injury to the Triangle, its community, businesses, social institutions and residential areas caused or threatened to be caused by the defendants in constructing or permitting to be constructed a section of the Interstate Highway System through that particular area:

(a) without procedural compliance with federal statutes and regulations relating to public hearings concerning proposed routes of Interstate Highways, and

(b) without giving consideration to the economic and social aspects of the routing of the Interstate Highway as required by federal statutes and regulations, and

(c) without proper regard to the discriminatory racial implications of the proposed routing of the Interstate Highway through the Triangle, and

(d) without due process of law, and

(e) without compliance with federal statutes and regulations relating to the relocation of displacees.

This is a proper class action under rule 23 of the Federal Rules of Civil Procedure. Plaintiffs represent a class of persons who are similarly injured by reason of the wrongful acts of defendants complained of herein. There are common questions of law and fact and the claims of the named plaintiffs are typical. The class is so numerous that joinder of all members is impracticable and pursuit of individual remedies is economically infeasible. Many persons within the class are not aware of their rights nor are they in a financial position to assert them. Relegation of these claims to individual litigation would result in an unreasonable multiplicity of suits and a corresponding burden on the courts. A class action is far superior to all other methods for fairly and efficiently adjudicating this controversy. The representative parties will fairly protect the interests of the class which plaintiffs represent.

4. The Triangle is the particular area of the City of Charleston, West Virginia bounded generally as follows: on the North by Dryden Street, on the East by Capitol Street, on the South by Washington Street and on the West by the Elk River. The Triangle is predominantly Negro. The inhabitants have developed a social and economic cul-

ture which is indigenous and unique to that particular group. The physical community as well as the culture of the inhabitants of the Triangle will be blindly destroyed by the proposed construction of a section of the Interstate Highway (I-64 and I-77) through that area, because of the condemnation and taking of substantial land for rights-of-way.

5. This is a proceeding for declaratory judgment, temporary restraining order, preliminary and permanent injunction to restrain the defendants individually or acting in concert, their agents, servants, employees, attorneys, successors and all persons participating with them, from proceeding with the implementation of plans for the construction of a segment of the I-64, I-77 Federal Interstate Highway System in and through the Triangle District in that the choice and approval of that routing was made illegally and unconstitutionally.

6. Plaintiff Triangle Improvement Council is a non-profit corporation, incorporated under the laws of the State of West Virginia, with its offices located in the Triangle at the John F. Kennedy Center, 201 Donnally Street, Charleston, West Virginia. It is a citizen participant organization dedicated to the development and improvement of the Triangle community, and has as its existing and present purpose the preservation of that community as a vital residential and business area. The essential goal of the Triangle Improvement Council is to prevent the eradication and extinction of a viable Negro community and to provide for its future and growth by the installation of housing, business and recreational facilities. Plaintiff William S. Preston is its President, and plaintiffs Clarence Smith, Regina McLendon, Judy Eckles, Henry C. Haynes and Leslie Brad-

shaw are respectively its vice-president, secretary, assistant secretary, treasurer, and financial secretary.

7. Plaintiff Keith Kincaid is a Negro resident of the Triangle. He resides in and operates the Keith Hotel which is located at 509 Christopher Street. The present alignment of simultaneous I-64, I-77, will result in the taking of this property as well as the destruction of a substantial part of the community in which Mr. Kincaid resides.

8. Plaintiff Tennis Hogans is a Negro operator of a barbershop at 503 Court Street in the Triangle. The building in which Mr. Hogans maintains his barbershop has already been taken by the State Road Commission and will be destroyed to provide a part of the land necessary for the construction of simultaneous I-64, I-77.

9. Plaintiff Robert Bayes, his wife, Pauline and his three teen-age children are Negro residents of the Triangle. The family home at 711 Young Street which is owned by Mrs. Bayes will be taken to make way for the Interstate Highway I-64, I-77 and their community will also be substantially damaged by its construction.

10. Plaintiff Katie Dean is a Negro who resides at 203½ Bullitt Street in the Triangle. She was previously required by the State Road Commission to move from a residence on North Rand Street which was in the path of the proposed Interstate Highway. She now fears the injury and upset to the Triangle which will result from the building of simultaneous I-64, I-77.

11. Plaintiff Sedalia Haynes is a Negro resident of the Triangle. She is a tenant in a dwelling unit at 712 Young Street. Mrs. Haynes has only recently learned that she will have to move because the house in which she lives

is to be demolished as a part of clearing the way for the Interstate Highway.

12. Plaintiff Lillian Day is a white resident of the Triangle. She rents an apartment at 601 Summers Street, which lies in the path of I-64, I-77.

13. Defendant, M. R. Hamill is the Commissioner of the State Road Commission of the State of West Virginia; the officer charged with the responsibility of supervising the planning, construction, reconstruction, repairs and maintenance of State roads and highways and the acquisition of rights-of-way necessary for the construction for such roads and highways and further, with the duty of planning the State's part in any proposed or contemplated system of interstate roads, (West Virginia CODE Sections, 17-2A-8, 17-2A-17 and 17-4-4).

14. Defendant, O. R. Colan is the Director of the Right of Way Division of the State Road Commission of the State of West Virginia; the officer charged with the responsibility of advising the Commissioner as to the planning, purchasing or otherwise procuring of real properties necessary for the construction of state or interstate roads and highways.

15. Defendants City of Charleston, Elmer H. Dodson and City Council are the corporate governing body and elected officers representing the citizens of the municipal area of Charleston, Kanawha County, West Virginia. These municipal defendants are charged with the sensitive representation of the desires and best interests of the constituents, residents of the City and relating same to State and Federal officials whose conduct threatens the safety and well-being of those constituents.

16. Defendant, Alan S. Boyd is the Secretary of the Department of Transportation of the United States; the officer possessed with the ultimate power and authority over the approval of expenditures of federal monies for the construction of Highways in the Interstate Highway System and in any other matters relating thereto.

17. Defendant Lowell K. Bridwell is Administrator of the Federal Highway Administration and Defendant Francis C. Turner is the director of the Bureau of Public Roads of the United States. Both are heads of agencies under and responsible to the Department of Transportation for review and recommendation of acceptance or rejection of proposed Interstate Highway routes, and serve in a study and advisory capacity to that Department in matters relating to the design, engineering cost, social and economic considerations which bear on proposed construction of Interstate Highways.

18. Pursuant to federal statute, Title 23 U.S.C. §128, the State Road Commission of West Virginia held a so-called "public hearing" on June 10, 1964, in the Charleston Civic Center in Charleston, West Virginia. This hearing was inadequate and was neither within the letter nor the spirit of statutory requirements. Citizens and groups of citizens, particularly the plaintiffs herein, were not given a fair opportunity to participate in the decision making process because:

(A) Notice of the "public hearing" was inadequate in that it failed to inform citizens of the Triangle and of the Kanawha Valley generally of the existence, nature, purpose and potential affects of such hearing, and

(B) The scope of the hearing was too large because it involved the discussion of over ten individual plans for the construction of an excess of 45 miles of Interstate Highway, and

(C) The format of the hearing was organized to discourage citizen participation in that the scope was too great (as alleged in [B] above), the discussion was too technical in nature to elicit lay testimony, and its length was oppressive and inhibiting, and

(D) The hearing was premature in that it did not provide detailed information as to specific location and design of the highway, and

(E) The hearing was not made a proper forum for the discussion of the social and racial factors involved in the projected destruction of the established Triangle community.

19. Absent the requirement of a public hearing, there is a duty imposed on defendants to inquire into the potential adverse social effects of the construction of an Interstate Highway. Defendants must have known and did know of the social detriment which would result from the taking of substantial land area from the Triangle. Negro residences will be destroyed, Negro businesses will be taken, urban renewal programs are inhibited, the community will be substantially reduced in size with a consequent increase in population density and the Negro citizens have already and will further be made to feel oppressed and helpless. Defendants have at all times failed to adequately weigh the social costs of building the simultaneous I-64, I-77 Interstate Highway through the Triangle.

20. By implementing the proposed construction of I-64 I-77 and by the expenditure of State and Federal funds therefor, the defendants have and will be responsible for acts which are racially discriminatory and in violation of the rights secured to plaintiffs and the class they represent by the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution. The disproportionately adverse result to the Negro community of the Triangle is capricious and arbitrary and cannot be reasonably justified.

21. Defendants, by their acts in proposing, adopting or acquiescing in a routing of the simultaneous I-64 and I-77 Highways through the Triangle, without giving meaningful consideration to the views of those adversely affected, are responsible for the destruction of a well-established and stable community. By so doing, defendants are taking property without due process of law in violation of the rights of the plaintiffs and the class which they represent as are secured by the Fifth and Fourteenth Amendments to the United States Constitution.

22. Chapter V of Title 23 U.S.C. and the administrative regulations adopted pursuant thereto by the United States Department of Transportation (Federal Highway Administration, Bureau of Public Roads Instructional Memorandum 80-1-68 on relocation assistance, effective August 23, 1968) provide that no federal funds shall be forthcoming to any state which does not provide for comparable, decent, safe and sanitary housing for those displaced by an interstate highway. Over five hundred persons in the Triangle will be displaced if I-64 and I-77 continues to be constructed in the present path. State Road Commission de-

fendants will not, have not and cannot follow the federal directorates for relocation and as a result, irreparable harm has and will continue to result to residents of the Triangle who are in the path of the Highway.

23. Defendants M. R. Hamill, State Road Commissioner and successor to Burl Sawyers and O. R. Colan, Director of the Right of Way Division of the State Road Commission have endorsed and adopted the decision to route the simultaneous I-64 and I-77 Highway through the Triangle and are responsible for its implementation and construction. In so doing, these defendants have acted and will continue to act arbitrarily, capriciously and unlawfully in that they have failed to recognize the inadequacies of the public hearing of June 10, 1964, and have failed to take into consideration the social, environmental and human factors necessary for a decision which is representative of the public interest, and have and will continue to deprive plaintiffs and the group which they represent their rights as guaranteed by the Constitution of the United States, and have and will continue to fail to provide the requisite relocation assistance to affected persons in the Triangle.

24. Defendants CITY OF CHARLESTON, its Mayor ELMER H. DODSON, and its CITY COUNCIL have acted arbitrarily, capriciously and in violation of their duties and obligations as representatives of the residents of the Triangle community in that they have at all times acquiesced and cooperated in the proposed routing of I-64 and I-77 and have refrained from the use of the considerable powers of persuasion available to them in behalf of residents of the Triangle; and this done with full knowledge that the proposed Highway construction was illegal and unconstitutional.

25. Defendants ALAN S. BOYD, Secretary of Transportation, LOWELL K. BRIDWELL, Federal Highway Administrator, and FRANCIS C. TURNER, Director of the Bureau of Public Roads by adopting and endorsing the decision of the State Road Commission with respect to the proposed highway location and by approving the expenditure of federal monies therefor, have acted arbitrarily, capriciously and unlawfully in that they have failed to recognize and disapprove of the acts complained of in paragraphs 18 through 22 above which are in violation of the Federal-Aid Highway Act and the Constitution of the United States.

26. If defendants are permitted to continue to act in accordance with the proposed plan for the construction of the described link of the Interstate Highway through the Triangle community in the City of Charleston, irreparable harm will result to the plaintiffs and to the class of persons in whose behalf they sue. Defendants' acts are continuing and ongoing and the only immediate and effective remedy available to plaintiffs is the temporary restraining order and injunctive relief sought, as the progressive process of letting bids, acquisition of rights of way and other acts necessary to the implementation of the present plan serves to compound the degree and irreparability of the injury. The granting of such relief and the resulting delay in the implementation will not seriously or substantially prejudice any rights of the defendants.

WHEREFORE, plaintiff respectfully pray that upon receipt of this Complaint:

I. That this Court assume jurisdiction of this cause.

II. That this Court determine that this is a proper class action, under Rule 23 of the Federal Rules of Civil Procedure.

III. That this Court issue a temporary restraining order pending the final hearing and determination of this cause, restraining the defendants, their agents, servants, employees, attorneys, successors and all persons and agencies in active concert and participation with them from proceeding with or otherwise implementing the construction of the section of interstate Highway I-64 and I-77 through the Triangle community of Charleston, West Virginia; and from expending or otherwise obligating any State or Federal funds therefor; and from letting any further bids or pursuing any existing contracts and from purchasing or attempting to purchase any right-of-way properties until further order of this Court.

IV. That this Court advance this cause on the docket and cause it to be heard at the earliest convenience. Further, that the defendants and each of them be required to show cause why the temporary restraining order hereinbefore prayed for should not be made permanent injunction.

V. That this Court enter a declaratory judgment pursuant to Title 28 U.S.C. of §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure to the effect that:

(A) The public hearing held pursuant to Title 23 U.S.C. 128 was not within the spirit and letter of Federal laws and administrative regulations as alleged in paragraphs 18 and 19 of this complaint, and

(B) That the proposed routing of the Interstate Highway I-64 and I-77 through the Triangle community deprives plaintiffs and the class of persons whom they represent their rights as secured by the Equal Protection and Due Process Clauses of the Fifth and

Fourteenth Amendments to the United States Constitution, and

(C) That adequate relocation of displacees in the Triangle has not, will not and cannot be provided by the State Road Commission as required by Federal statute.

VI. That this Court enter temporary and permanent injunction:

(A) Restraining the defendants, their agents, servants, employees, attorneys, successors and all persons and agencies in active concert and participation with them from proceeding with or otherwise implementing the presently proposed routing of the Interstate Highway I-64 and I-77 through the Triangle or any part thereof and from substituting any plan which in any way discriminates against the residents of the Triangle, and

(B) Requiring the defendants to select an alternate route for the Interstate Highway I-64 and I-77, which in no way prejudices the substantial interests or the constitutional rights of the plaintiffs and the class of persons they represent, and

(C) Requiring the defendants to comply with the mandate of federal statutes and regulations governing public hearings on proposed interstate highway routes.

VII. That this Court grant such other, additional or alternative relief as may seem necessary and equitable.

VIII. That this Court grant the plaintiffs their costs herein.

Complaint

By Counsel
The Legal Aid Society of Charleston

/s/ A. Andrew MacQueen, III
A. Andrew MacQueen, III

/s/ John L. Boettner, Jr.
John L. Boettner, Jr.

/s/ Donald D. Saxton, Jr.
Donald D. Saxton, Jr.
702½ Lee Street
Charleston, West Virginia

Of Counsel:

E. R. McClelland
Herman G. Canady, Jr.
Ronald E. Wilson
Ronald G. Pearson
Donald L. Hall
Tom Lytton

The Legal Aid Society of Charleston
702½ Lee Street
Charleston, West Virginia

(Jurat omitted in printing.)

Answer by the Defendants, John Volpe, *et al.*

(Title Omitted in Printing.)

In response to the plaintiffs' complaint, the defendants, John Volpe, individually, and as Secretary of Transportation of the United States; Francis C. Turner, individually, and as Administrator of the Federal Highway Administration of the United States; and the Acting Director of the Bureau of Public Roads of the United States, allege as follows:

First Defense

1. The plaintiffs herein lack standing to maintain this action.

2. This Court lacks jurisdiction over the subject matter of this action since this court is committed to the unreviewable discretion of these defendants.

3. This action is barred by laches.

4. This Court lacks personal jurisdiction over these defendants and venue is improper in the Southern District of West Virginia.

5. The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. The defendants deny each and every allegation contained in paragraphs 1, 5, 19, 20, 21, 22, 23, 24, 25 and 26 of the plaintiffs' complaint.

2. The defendants lack information sufficient to form a belief as to the truth of the allegations contained in para-

graphs 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12 of the plaintiffs' complaint.

3. The defendants deny each and every allegation contained in paragraphs 13, 14, 15, 16 and 17 except they admit that there are official positions similar to those named in paragraphs 13, 14, 15, 16 and 17.

4. The defendants deny each and every allegation contained in paragraph 18, except they admit that pursuant to 23 U.S.C. §128, the State Road Commission of West Virginia held a public hearing on June 10, 1964, in the Charleston Civic Center, Charleston, West Virginia.

WHEREFORE, the defendants demand that the action be dismissed and the plaintiffs pay their costs herein expended.

Original Signed by
CHARLES M. LOVE, III
Charles M. Love, III
Assistant United States Attorney

(Certificate of Service Omitted in Printing.)

Answer of the Defendants, William S. Ritchie, Jr., *et al.*

(Title Omitted in Printing.)

Comes now the defendant, William S. Ritchie, Jr., Commissioner, State Road Commission of the State of West Virginia, successor to M. R. Hamill, Commissioner, State Road Commission of the State of West Virginia, and substituted as defendant in place and stead of the said M. R. Hamill in the above styled matter, and O. R. Colan, Director of the Right of Way Division, State Road Commission of the State of West Virginia and for answer to the Complaint filed herein says as follows:

I.

Said defendants deny each and every allegation contained in said Complaint except as are herein specifically admitted.

II.

Said defendants neither admit nor deny the allegations contained in Paragraph I of said Complaint in regard to invoking the jurisdiction and authority of this Court and demand strict proof of the jurisdiction of this Court. Said defendants deny plaintiffs' contention of activities contrary to the laws and Constitution of the United States.

III.

Said defendants deny the allegations contained in Paragraph 3 of said Complaint that the action was brought by the plaintiffs on behalf of other similarly affected by

the acts of the defendants; that all the plaintiffs have a personal interest (within the meaning of the law) in the particular area in the City of Charleston known as the Triangle District; that all the plaintiffs named have a substantial interest in preventing the threatened destruction of or irreparable injury to the Triangle District, its community, business, social institutions and residential areas (said defendants alleging in this regard that there is no threatened destruction and none caused or threatened to be caused by the defendants in constructioning or permitting to be constructed a section of the interstate highway system through that particular area).

Said defendants likewise deny that there was not procedural compliance with Federal statutes and regulations relating to public hearings concerning proposed routes of interstate highways; further deny that no consideration was given to the economic and social aspects of the routing of the interstate highway insofar as the same was required by the then existing Federal statutes and regulations; further deny that the routing was without proper regard to the discriminatory racial implications of the proposed routing of the interstate highway through the Triangle and in this regard say that they were guilty of no discriminatory racial implications in the routing through the Triangle area; and deny that action of said defendants in so routing said interstate highway was without due process of law; and further deny that their action in so routing the interstate highway and any action taken pursuant thereto has failed to comply with Federal statutes and regulations relating to relocation of displacees.

Said defendants further deny that this is a proper class action under Rule 23 of the Federal Rules of Civil

Procedure and deny each and every allegation contained in said Complaint which attempts to bring said Complaint within the requirements for a proper class action. Defendants further specifically deny that a class action is far superior to all other methods for fairly and efficiently adjudicating this controversy and that the representative parties will fairly protect the interests of the class which plaintiffs' represent.

IV.

Defendants admit the allegations contained in Paragraph 4 of said Complaint in regard to the geographical boundaries of "the Triangle" but deny that the inhabitants of the area encompassed by the alleged geographical boundaries are predominantly negro. These defendants also deny that the inhabitants of that area have developed a social and economic culture which is indigenous and unique to that particular group and deny that the physical community, as well as the culture of the inhabitants of the Triangle will be blindly destroyed by the proposed construction of a section of the interstate highway through that area because of the condemnation and taking of substantial land for rights of way, and specifically deny that I-64 goes through said area.

V.

Although denying the right to bring such action, these defendants admit the allegations contained in Paragraph 5 of said Complaint except that they deny that the choice and approval of that routing was made illegally and un-

constitutionally and move the Court that such allegation be stricken from the Complaint as being conclusions of law with no allegations of facts to substantiate the same.

VI.

These defendants do not have sufficient information upon which to form an opinion as to the truth or falsity of the allegations contained in Paragraph 6 of plaintiffs' Complaint and therefore must deny the same.

VII.

These defendants, upon information and belief, admit that the individuals named in Paragraph Numbers 7, 8, 9, 10, 11 and 12 reside in the Triangle area at the addresses set forth in said paragraphs and admit that the properties located at the addresses set forth in said Paragraph Numbers 7, 8, 9, 10, 11 and 12 lie in the path of the proposed interstate construction through the "Triangle area", but deny that said interstate highway is "simultaneous I-64, I-77" and say that only I-77 goes through the Triangle area and deny the allegations and innuendos contained in said paragraphs in regard to the destruction of a substantial part of the community if said allegations infer any sort of destruction other than that of physical property. Defendants, to the contrary, allege that their actions are to the benefit of the plaintiffs as a class and rather than destroying the community in a social sense are improving the community and the actions are a benefit not only to the plaintiffs herein but to the other citizens of the City of Charleston and the State of West Virginia as well.

VIII.

Said defendants admit, that at the time of the filing of the Complaint, the said M. R. Hamill was the Commissioner of the State Road Commission of the State of West Virginia and admit the other allegations contained in Paragraph 13 of said Complaint in regard to the duties and responsibilities of the Commissioner of the State Road Commission of the State of West Virginia and further says that the said William S. Ritchie, Jr., is the successor to the said M. R. Hamill.

IX.

These defendants admit the allegations contained in Paragraph 14 of the plaintiffs' Complaint.

X.

Said defendants, upon information and belief, admit the allegations contained in Paragraphs 15, 16 and 17 of plaintiffs' Complaint in regard to the names of the various defendants and their official titles as of the date of the filing of the Complaint, but neither admit nor deny the allegations of said paragraphs in regard to the respective obligations, duties and responsibilities of the other defendants named in this proceeding.

XI.

These defendants admit that a public hearing was held in the Charleston Civic Center on June 10, 1964 pursuant

to the provisions of 23 U.S.C., § 128 and deny the allegations of Paragraph 18 of plaintiffs' Complaint that the same was a "so-called public hearing" and denies each and every other allegation contained in said Paragraph 18.

XII.

These defendants admit of no duty imposed upon them to inquire into the potential adverse social effects of the construction of an interstate highway at the time of the locating and authorizing of the two interstate projects in question. These defendants further deny that they must have known or did know of the social detriment which would result from the taking of substantial land area from the Triangle and say in this regard that it is impossible to know of something which does not exist and alleges that no social detriment has or will result from the taking of substantial land area from the Triangle. It is admitted that the business buildings and the residence buildings of negroes will be destroyed and taken and say that the same is true of the business buildings and the residence buildings of any other race, creed or color which are within the path of the proposed interstate highway. It is denied that the Urban Renewal Programs are inhibited in any way and denied that the "community" will be substantially reduced in size with a consequent increase in population density although admitting certain land areas will be devoted to highway construction but plaintiffs' allegations presupposes that all of the residents of the Triangle community are somehow bound and obligated to remain within the geographical confines set forth in Paragraph 4 of their Complaint, which allegations are without any basis, either

factually or speculative. These defendants deny that they have at all times failed to adequately weigh the social costs of building the interstate highway through the Triangle, and again deny that said interstate highway is "simultaneous I-64 and 1-77."

XIII.

These defendants deny each and every allegation contained in Paragraph 20 of plaintiffs' Complaint.

XIV.

These defendants deny the allegations contained in Paragraph 21 of the plaintiffs' Complaint.

XV.

These defendants deny the allegations of Paragraph 22 in that the same does not correctly recite the provisions of Chapter V, Title 23, U.S.C. and the Federal Highway Administration, Bureau of Public Roads Instructional Memorandum 80-1-68, and leaves the inference of the requirement of "providing" comparable, decent, safe and sanitary housing for displaced persons, which inference is denied. These defendants deny that over five hundred persons in the Triangle will be displaced if I-77 continues to be constructed in the present path and again deny that I-64 goes through the Triangle area. These defendants also deny that they will not, have not and cannot follow the federal directorates for relocation and as a result, irreparable harm has and will continue to result to residents of the Triangle who are in the path of the highway, and

in this regard allege that the State Road Commission of the State of West Virginia has in the past, can now, and will in the future comply with all existing regulations and directorates concerning all persons displaced by interstate highway projects throughout the State of West Virginia as well as those persons residing in the geographical area in the City of Charleston commonly referred to as "the Triangle."

XVI.

These defendants deny that they, as officials of the State Road Commission of the State of West Virginia, have endorsed and adopted the decision to route the simultaneous I-64 and I-77 highway through the Triangle and are responsible for its implementation and construction, but admit these allegations insofar as they pertain to I-77. However, defendants deny each and every other allegation contained in Paragraph 23 of plaintiffs' Complaint.

XVII.

These defendants feel that they are not in position to either admit nor deny the allegations contained in Paragraphs 24 and 25 of plaintiffs' Complaint in regard to allegations relating to other defendants in this proceeding, but upon information and belief and from these defendants contact and association with the defendants named therein, their agents, servants, employees and other officials allege that none of the named defendants have acted arbitrarily, capriciously and unlawfully in any manner or respect.

Answer of the Defendants, William S. Ritchie, Jr., et al.

XVIII.

These defendants deny each and every allegation contained in Paragraph 26 of plaintiffs' Complaint.

WHEREFORE, these defendants demand that plaintiffs' Complaint be dismissed, that their prayer for relief be denied, that these defendants recover their costs in their behalf expended.

WILLIAM S. RITCHIE, JR., Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director, Right of Way Division, State Road Commission of the State of West Virginia.
By Counsel

/s/ STANLEY E. PREISER
Stanley E. Preiser
PREISER, GREENE & HUNT
1012 Kanawha Boulevard, East
P. O. Box 2506
Charleston, West Virginia 25329

(Jurat Omitted in Printing.)

The Joint and Separate Answers of Defendants Elmer H. Dodson, *et al.*

(Title Omitted in Printing.)

Come now the defendants, Elmer H. Dodson, Mayor of the City of Charleston, West Virginia; the City of Charleston, West Virginia, a city corporate and body politic; the City Council of the City of Charleston, the Corporate Board of that city, and for joint and separate answer to the complaint herein filed do say:

I

Said defendants, CITY OF CHARLESTON, ELMER H. DODSON and CITY COUNCIL, admit that they are the corporate governing body and elected officers representing the citizens of the municipal area of Charleston, Kanawha County, West Virginia.

II

Defendants, City of Charleston, its Mayor, Elmer H. Dodson and its City Council deny that they have acted arbitrarily, capriciously and in violation of their duties and obligations as set forth in Paragraph 24 of the complaint filed herein.

III

The defendants, City of Charleston, its Mayor, Elmer H. Dodson and its City Council neither by state law nor City Charter have any authority for the location of a state highway within a municipality. West Virginia Code, 17-2A-8, places the responsibility and authority for the location of highways on the State Road Commissioner.

All allegations and averments set forth in the complaint not hereinbefore either specifically admitted or specifically

denied are here and now denied as fully and completely as though each were dealt with separately.

And now having fully answered, defendants pray hence to be dismissed with their costs.

.....

Elmer H. Dodson, Mayor of the City of Charleston, The City Council of the City of Charleston

by.....

B. Duffy Horan
City Solicitor
City of Charleston

B. Duffy Horan
City Solicitor
City Building
Charleston, West Virginia

Opinion of District Court

[314 F. Supp. 20]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

CA 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA MCLENDON, JUDY ECKLES, HENRY C. HAYNES, and LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

Plaintiffs,

VS.

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of Right of Way Division, State Road Commission of the State of West Virgnia; ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; JOHN VOLPE, individually and as Secretary of Transportation of the United States; LOWELL K. BRIDWELL, individually and as Administrator of the Federal Highway Administration of the United States and FRANCES C. TURNER, individually and as Director of the Bureau of Public Roads of the United States,

Defendants.

Opinion of District Court

MEMORANDUM OPINION

This dispute involves the location of a small segment of the Federal Interstate and National Defense Highway System as it is presently planned in a section of Charleston, West Virginia. The highway segment in question penetrates what is known as the Triangle area of Charleston which is populated predominantly by low-income families of the negro race. The disputed routing was approved in August 1964, and plaintiffs herein seek declaratory and injunctive relief against further steps for construction of the highway as presently routed.

Plaintiffs are a group of residents and citizens of the Triangle area and a local civic improvement association known as the Triangle Improvement Council (hereinafter TIC). The defendants include highway officials of the United States Department of Transportation (Federal defendants) and the State Road Commission of West Virginia (State defendants), and additionally, the City of Charleston, West Virginia, and its City Council and Mayor (Municipal defendants). The court recognizes that since this action was commenced certain personnel changes in the high levels of federal and state governments have resulted in different individuals being appointed to positions occupied by certain of the original defendants. Specifically, William S. Ritchie is now the Commissioner of the State Road Commission of West Virginia and John Volpe is now the Secretary of Transportation of the United States. Although Mr. Ritchie and Mr. Volpe have not been formally substituted as named defendants, the court recognizes such a substitution to be proper and accordingly makes such a substitution, pursuant to R. 25(d)(1), F.R.C.P.

The prime bases of the action are the alleged failure of the state and federal defendants to comply with the

relocation provisions of the Federal Highway Act of 1968, Pub. L. No. 40-495 (August 23, 1968), 23 U.S.C. Sections 501-511, and the alleged violation by the defendant of plaintiffs' constitutional rights under the Fourteenth Amendment. In addition, plaintiffs alleged a failure by the defendants to comply with the public hearing requirements of the federal statutes relative to the route selection for the interstate highway system in Charleston.

After an earlier denial of a motion by plaintiffs for a temporary restraining order, an evidentiary hearing was held on April 2 and 3, 1969, on a motion by plaintiffs for a preliminary injunction and motions to dismiss filed by the various defendants. The court being of the opinion that the allegations relative to the public hearing requirements were, based upon affidavits and exhibits submitted at the hearing on the temporary restraining order, plainly without merit, restricted the evidence in the proceedings on April 2 and 3 to the allegations relative to relocation; i.e., (1) failure to comply with the statutory provisions and (2) the constitutional equal protection question raised by plaintiffs relative to the relocation procedures.

Since this action was filed on December 3, 1968, a substantial number of motions, orders, etc. have been considered by the court and disposed of as follows.

Except for extensions of time within which to file answers, no formal action was taken in this proceeding until March 5, 1969. Prior to that time, however, certain collateral "side agreements" were made between counsel relative to the matter of interstate highway progress in the Triangle area. Disagreements eventually arose relative to the breadth and import of the "side agreements," and on March 5, 1969 plaintiffs moved the court for a temporary restraining order which would have effected a cessation of all interstate highway activity in the Triangle area.

Certain broad subpoenas duces tecum were also issued on that date, directed to federal and state highway officials.

On March 10, 1969, a hearing on the motion for the temporary restraining order was held. At that time, motions to quash the subpoenas duces tecum which had been issued were filed and argued. As a result of that hearing, the court was of the opinion that injunctive relief would irreparably hinder the interstate highway program, and that the subpoenas duces tecum were overly broad and oppressive. Accordingly, a motion for a temporary restraining order was denied and the motions to quash the subpoenas duces tecum were granted.

On March 10, 1969, motions to dismiss the complaint were filed on behalf of the federal defendants, the state defendants, and the municipal defendants. These motions were supported by certain affidavits and exhibits. At that time, the motion to dismiss the municipal defendants was denied, and other dismissal motions were held in abeyance, and a hearing on the dismissal motions and on a motion for a preliminary injunction was set for April 1, 1969. An order reflecting the March 10 actions of the court was submitted by counsel and was entered on March 21.

On March 13, the plaintiffs caused more subpoenas to be issued for certain federal and state highway officials for the avowed purpose of taking the depositions of those officials. The state and federal defendants moved to quash the new subpoenas, alleging oppressiveness and lack of time to comply therewith prior to the April 1 hearing. A hearing on the motions to quash was held on March 17, and the court, being of the opinion that the motions were well taken, granted them and thereby quashed the subpoenas. An order reflecting this action was entered on March 24.

On March 24, plaintiffs moved the court to be permitted to amend their complaint in order to allege jurisdiction under the Administrative Procedure Act, 5 U.S.C. Sections 701 et. seq. The court was of the opinion that this motion was tardily made, and it was denied by order of March 28.

Also on March 24, the plaintiffs filed motions for production of certain documents alleged to be in the possession of federal and state officials. The defendants, on March 28, moved that the motions for production be quashed by the court. The court heard these motions on March 29, and being of the opinion that it would be overly burdensome to require their production on such short notice prior to the hearing on this matter, denied the motions for production and granted the motions to quash. However, the court instructed the defendants to bring all relevant material to the scheduled hearing, in order that plaintiffs and the court might have the benefit of it. In addition, the hearing date was set over until April 2 in order to accommodate counsel for the state defendants. An order reflecting these actions was entered on April 28.

Prior to March 29, the court had met informally with counsel for the various parties, at which time counsel were advised that the court considered any challenge to the highway routing decision to be barred by laches, and that the court was of the opinion that the only allegation of possible merit made by plaintiff related to the displacee relocation assistance program being administered by the State of West Virginia. Counsel were accordingly requested to prepare for the hearing with that in mind, and so present only evidence which related to the relocation assistance program.

On March 29, plaintiffs filed a formal written motion with the court to the effect that they be permitted to present

evidence at the scheduled hearing on all the issues and theories of law embodied in their complaint. Such motion was denied, in accord with the court's previous decision to restrict evidence at the hearing to that which was material and relevant to the relocation issue. The denial of that motion was reflected in an order entered subsequent to the hearing, on April 28.

On April 2 and 3, the evidentiary hearing was held relative to the various dismissal motions and to the motion for a preliminary injunction which had been formally filed by plaintiffs on April 1. At the conclusion of the presentation of evidence, the court denied the various dismissal motions and the motion for a preliminary injunction. Counsel thereupon agreed to submit the case to the court on the record as then developed for decision on its merits. It was further agreed that briefs on the merits of the case would be submitted by April 23, which date was subsequently changed, on plaintiffs motion, to May 5. In addition, the court reconsidered its ruling relative to the denial of plaintiffs motion to amend its jurisdictional allegations. The order denying them the right to allege the Administrative Procedure Act, 5 U.S.C. Sections 701 et. seq. as a basis for jurisdiction in this proceeding was vacated and the motion to amend was granted. An order reflecting the court's actions on all of these matters was entered on April 29.

By May 8 all defendants had filed answers in this matter, counsel had filed briefs with the court on the merits of the case, and the case was submitted for final disposition.

Background Discussion

In 1956, the Congress of the United States provided for the construction of the extensive Interstate Highway

System. The statutory bases for the program were the Federal-Aid Highway Act of 1956 and the Highway Revenue Act of 1956. Numerous amendments have since been made to the original statutes, and, in 1968, the relocation assistance provisions were greatly expanded. Prior to 1968, however, much had transpired relative to the routing of the interstate system in the Kanawha Valley and Charleston, West Virginia, area.

Charleston was planned as the hub of the interstate system in West Virginia, and three interstate routes will converge on the Charleston area. Interstate Route 77, running north-south from Cleveland, Ohio to the southeastern United States, and Interstate Route 64, running east-west from coast to coast, both come through the Charleston area. The third Interstate Route, I-79, enters the Charleston area from the north, beginning at Erie, Pennsylvania, and terminating at Charleston.

Extensive planning, research, public discussion, and controversy was necessarily attendant upon the routing of these highways in the Charleston area. The record indicates that public hearings relative to these routes were held in Charleston on March 29, 1960 and June 10, 1964, and transcripts of these hearings have been submitted to the court. Prior to the 1964 hearing, numerous studies were made relative to the routing, the most important of which, the so-called TAMS study, was completed in early 1964. The proposed system recommended by the TAMS study was discussed at the 1964 hearing, and, along with nine alternate routes, was portrayed by maps, aerial photographs, and numerous exhibits. At the time of the 1964 hearing, the State Road Commission of West Virginia had indicated no preference among the suggested routes and it emphasized that none would be chosen until a study of

developments at the hearing was made along with other relevant data.

Consideration of the interstate system routing in Kanawha County and Charleston was concluded in August of 1964, with final approval of the Bureau of Public Roads being given on August 31, 1964. As approved, the routing of I-77 and I-64 (primary designation of the highway is I-77, secondary designation is I-64, and is hereinafter referred to as I-77) penetrates the Triangle area of Charleston. No protest from the plaintiffs in this action relative to that routing was made until December 3, 1968, when this action was filed.

Construction of the interstate highway system through the Triangle area involves two interstate projects of the State Road Commission. These two projects are designated I-77-3(66)100 (hereinafter Project A) and I-77-3(67)98 (hereinafter Project B). The evidence indicates that each of these projects involves part of the Triangle area, and while all of the Triangle area affected by the interstate system is located within the confines of these two projects, the entire area encompassed by these projects includes areas outside the Triangle.

The evidence indicates that the Bureau of Public Roads, in addition to approving the routing of the highway, is required to make certain step-by-step authorizations of funds to be utilized in the projects such as surveying, abstracting titles, acquiring rights-of-way, and various other aspects of the highway construction. In this regard, the two subject projects were in the right-of-way acquisition and displacee relocation stage when this action was commenced. The actual dates on which authorization for right-of-way acquisition was given were, according to the testimony at the hearing, as follows:

1. PROJECT A—(four separate authorizations)

(a) April 19, 1966

(b) September 22, 1966

(c) January 27, 1967

(d) May 23, 1967

2. PROJECT B—November 30, 1966

It is apparent, therefore, that complete authority for right-of-way acquisition in the Triangle area had been given by May 23, 1967, and had been in effect over a year prior to the enactment of the 1968 Highway Act.

At the time of the approval of the routing in question by the Bureau of Public Roads, the applicable statutory provisions relative to displacee relocation assistance was 23 U.S.C. Section 133. Compliance with that statute, enacted in 1962 in Pub. L. No. 87-866, was required before a state could participate in the federal financial assistance available for highway construction. Plaintiffs do not allege that the state defendants were not complying with Section 133, but contend that the provisions of 23 U.S.C. Sections 501-511 (Pub. L. No. 90-485), which repeals Section 133 now apply and are not presently being met by the state defendants. As noted, the new relocation assistance provisions (Sections 501-511) were enacted August 23, 1968, over a year after the last authorization for right-of-way acquisition was given the West Virginia State Road Commission by the Bureau of Public Roads.

The record in this case fails to indicate any complaints from the plaintiffs herein prior to the institution of this action relative to the highway location in the Triangle area.

The record does, however, indicate that State Road Commission officials met with TIC members and Triangle area residents in 1965 and discussed the impact that the interstate would have on that area. None of the questions raised in this action were raised at that conference.

THE ROUTING DECISION

As noted above, the routing of I-77 through the Triangle area was approved by the federal authorities August 31, 1964. Prior to that time, on August 20, 1964, the State Road Commission of West Virginia had finalized its determination of the manner in which the interstate system in Kanawha County and Charleston should be routed. The record in this action indicates that the State's routing determination complied with the federal statutory and regulatory requirements in effect at that time. They had made a comprehensive study of the matter; had held open and well-advertised public hearings, and had, as administrative officials must do, made the decision on the interstate routing. The federal government which pays for 90 percent of the cost of interstate highway construction approved the state action. The endorsement by the federal authorities of the state's routing decision is strong evidence that the proper procedure for highway planning and routing had been followed.

Furthermore, it is undisputed that the plaintiffs herein sat on their alleged rights for over four years until the interstate program was well into the right-of-way acquisition stage before seeking any judicial review of the administrative determination. I am accordingly of the view that the doctrine of laches precludes review of that decision at this late date, and that the only question of possible

merit raised in this instance relates to the displacee relocation procedure relative to those persons living in the I-77 corridor in the Triangle area.

Of further relevance on the question of undue delay by plaintiffs in bringing their action is the testimony by federal and state officials relative to the effect injunctive relief might have upon the entire interstate highway program in Charleston. The evidence indicates that such relief might delay completion of the system by as much as five years, would cause comprehensive new planning procedures to be initiated, would result in an additional financial burden of staggering proportions, and could result in a complete cessation of the flow of federal interstate highway-aid funds into this area of West Virginia.

The Relocation Questions

As noted above, the displacee relocation assistance provisions relied upon by the plaintiffs herein were enacted into law on August 23, 1968. Pursuant to its provisions, the Bureau of Public Roads issued Instructional Memorandum (IM) 80-1-68 on September 5, 1968, with an effective date of August 23, 1968.

In the two highway projects which affect the Triangle area, a substantial number of persons required relocation housing. Evidence presented at the evidentiary hearing indicated the following number of persons in Projects A and B either had been or were to be relocated, as of February 28, 1969.

In Projects A and B—as of February 28, 1969

	Project A	*Project B*	*Total*
To be relocated	380	496	876
Had been relocated	913	401	1,314
			2,190

Of these totals, however, not all are or were within the confines of the Triangle area as such. The figures for the Triangle area itself were as follows:

In Triangle area—as of February 28, 1969

	Project A	*Project B*	*Total*
To be relocated	104	180	284
Had been relocated	Not presented	Not presented	Not presented

The number of persons who had not been relocated from Projects A and B in the Triangle area as of August 23, 1968 (the enactment date of the Federal-Aid Highway Act of 1968, and BPR IM 80-1-68) was not presented. Accordingly, the number of persons relocated since August 23, 1968 was not determined.

Prior to consideration of whether the relocation program of the State Road Commission complies with 23 U.S.C. Sections 501-511 and BPR IM 80-1-68 is the question of whether those relocation provisions are at all applicable in the present controversy. Plaintiffs contend that the relocation provisions apply but are not being complied with, and, in fact, cannot be complied with; while defendants contend the relocation provisions do not apply to displacee relocation in Projects A and B in the subject area, and, in any event, the State Road Commission's displacee relocation program would satisfy those provisions.

Judicial Review

The plaintiffs allege jurisdiction in this court on the basis of federal civil rights statutes, 28 U.S.C. Sections 1981—1983, 2000(d), federal questions raised, 28 U.S.C. Section 1331(a), suits against officers and employees of

the United States, 28 U.S.C. Section 1361, the Administrative Procedure Act (APA), 5 U.S.C. Sections 701—706, and declaratory judgment statute, 28 U.S.C. Sections 2201 and 2202.

Without making a detailed analysis of each of these jurisdictional allegations, I am satisfied that judicial review of agency action pursuant to the federal highway program may be had. *Road Review League* v. *Boyd,* 270 F. Supp. 650 (S.D. N.Y. 1967). There is nothing in the federal statutes which indicates that Congress intended to immunize the Bureau of Public Roads from judicial scrutiny of its acts. As was stated in the recent case of *Western Addition Community Organization* v. *Weaver,* 294 F.Supp. 433 (N.D. Calif. 1968), which involved relocation of urban renewal displacees (at 442):

> "* * * The test for judicial reviewability, however, is not, as contended by defendants, whether the statute provides for it, but whether the statute precludes it. Federal administrative action is subject to judicial review unless the statute, itself, precludes such review."

Western Addition cites *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967) as authority for a basic presumption that judicial review is available to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. It points out that this rule has been reinforced by the Administrative Procedure Act. Judge Sweigert stated in *Western Addition* (at 442):

> "When no other remedy for judicial review is provided, persons suffering legal wrong because of administrative action or otherwise adversely affected or aggrieved by it within the meaning of a relevant stat-

ute, may proceed under the Administrative Procedure Act (5 U.S.C. Sections 701, 702, 704) except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law."

In this instance, as in *Western Addition,* there is no statute precluding judicial review. I am accordingly of the view that the administrative decisions involved in this matter are judicially reviewable under the Administrative Procedure Act, 5 U.S.C. Sections 701-706.

STANDING OF PLAINTIFFS

Prior to any consideration of the merits of this matter, brief review should also be given to the question of whether the parties bringing this action have standing to challenge the actions of the defendants. As it was put by the Supreme Court in its recent consideration of the standing problem, *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968):

"* * * In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. * * *"

Title 5 U.S.C. Section 702, the section of the Administrative Procedure Act relative to the "right of review," provides that:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Under this section, the Supreme Court has held that a person is "aggrieved" if he asserts a personal interest which the "relevant statute" was designed to protect. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968). The relevant statute involved here, which is the Federal Highway Act of 1968, particularly the relocation assistance provisions contained therein, clearly was intended to protect persons such as the plaintiffs in this matter.

Several recent cases have allowed litigants who were situated similarly to the plaintiffs herein standing to challenge government projects, particularly *Scenic Hudson Preservation Conference* v. *Federal Power Comm.*, 354 F.2d 608 (2d Cir. 1965), *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968), *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), and *Western Addition Community Organization* v. *Weaver*, supra. In addition, the Supreme Court has given a broadened scope to the Administrative Procedure Act in *Hardin* v. *Kentucky Utilities Co.*, supra, and *Abbott Laboratories* v. *Gardner*, supra. These cases would appear to have rejected the view expressed in such cases as *Green-Street Association* v. *Daley*, 373 F.2d 1 (7th Cir. 1967), and *Johnson* v. *Redevelopment Agency of Oakland*, 317 F.2d 872 (9th Cir. 1963), which would deny relocation displacees the standing to challenge governmental action relative to them.

In the light of the authorities cited above, I am of the view that under the broadened scope of the Administrative Procedure Act, the plaintiffs in this matter would qualify as sufficiently "aggrieved" under a "relevant statute" to permit this court to proceed with consideration of the merits of their claims.

THE STATUTORY QUESTION

As was previously stated, the basic question in this whole matter turns largely upon the applicability of the displacee relocation provisions of the 1968 Highway Act to the particular segments of I-77 which penetrate the Triangle area of Charleston. Plaintiffs, of course, assert that the provisions apply, while the defendants assert that they do not apply. An examination of the statute itself, and the administrative interpretations of it (IM 80-1-68), is appropriate to determine which of the parties should prevail on this issue.

In 23 U.S.C. Section 502, relating to "Assurances of adequate relocation assistance program," it is provided that:

> "The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that—
>
> (1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 305, 506 and 507 of this title;
>
> (2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and
>
> (3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and in-

> dividuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment."

The two statutory sections cited in the first sentence of Section 502 provide for the submission of certain plans, specifications, and estimates for federal-aid highway projects to the Secretary of Transportation by the state highway department. Those necessary to be submitted are to be such "as the Secretary may require," and his approval of them is deemed to place a contractual obligation upon the federal government.

In the instant case, the testimony of the Secretary's representatives was clearly to the effect that the West Virginia State Road Commission had complied with all federal requirements relative to right-of-way acquisition in Projects A and B in the Triangle area. In fact, as noted above, authority for right-of-way acquisition in Projects A and B was given by the federal government in 1966 and 1967, with the final authorization being given on May 23, 1967.

In 23 U.S.C. Section 504(b), the 1968 Highway Act provided that:

> "Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property."

In the Instructional Memorandum (IM 80-1-68) which the Bureau of Public Roads issued pursuant to the relocation provisions of the 1968 Highway Act, the following provisions relative to applicability were set forth in paragraphs 2b(1), 2b(2) and 5b:

"2. • • •

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights of way which are occupied by an individual, family, business, farm operator, or nonprofit organization.

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

• • •

"5. • • •

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum."

With specific regard to the West Virginia State Road Commission's efforts in this area, the testimony of both federal and state employees indicates to me that an active and continuing displacee relocation assistance program has been and is being carried out. It appears that such a pro-

gram was in effect even prior to enactment of the 1968 Highway Act. In any event, the West Virginia Road Commission personnel in authority in the area of relocation assistance, and the personnel in the West Virginia office of the Bureau of Public Roads, interpreted the statutory and regulatory language to mean that the relocation requirements of the 1968 Act were not applicable to the particular projects here in question since final authority for right-of-way acquisition was given long before the 1968 Act was passed. In particular, they felt that the correct position relative to applicability of the 1968 Act was set forth in paragraph 5b of IM 80-1-68, to the effect that:

> "The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum."

The defendants submit that even if there is a question as to whether the assurances were or were not required in this instance, the agency's construction of the applicable statutes and regulations should be given considerable weight and not be overturned unless plainly incorrect. They cite several cases in support of this position, including *Udall* v. *Tallman,* 380 U.S. 1 (1965), wherein Mr. Chief Justice Warren stated (at 16):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need

not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, e.g., *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414."

I am convinced that this is a valid summary of the law in this area. I am further convinced, after analyzing the statutory provisions, their legislative history, and the instructional memoranda issued pursuant thereto, that Congress could not have intended that projects authorized and approved several years prior to the enactment of the 1968 statute were to be subject to inflexible and strict

compliance therewith. The administrative agency did not give it such an interpretation, and I am of the opinion that the agency's determination had a rational basis and should not be disturbed.

In any event, testimony of federal and state highway officials, especially that of the State Road Commission Director of Right-of-Way acquisition, O. R. Colan, indicates to me that the authorities are making a sincere effort to integrate the provisions of the relocation assistance provisions of the 1968 Highway Act into its program. Responsible public officials at both the federal and state levels testified forcefully and credibly that the West Virginia State Road Commission's displacee relocation program relative to the two projects affecting the Triangle area is in compliance with the provisions of the 1968 Act in a practical if not a formal manner, even though such compliance is not legally required. They assured the court that displacement would be conducted at a slow pace in order that appropriate replacement housing could be found, and that no one will be displaced unless suitable (i.e., decent, safe, and sanitary) and lawful relocation housing is available, and further that relocation assistance payments required by the statute would be made in all cases.

As mentioned above, this testimony indicates the federal defendants have determined that the West Virginia authorities can meet, are meeting, and will continue to meet the requirements of the regulations and statutes in its relocation program. As the case law indicates, such a determination is entitled to great weight and should be confirmed if premised on rational grounds. As many cases, including *Western Addition Community Organization* v. *Weaver*, supra, and *Road Review League* v. *Boyd*, supra, indicate, courts should not undertake the administration of complex

and far reaching federal programs, but upon appropriate judicial review should determine only whether the agency administering the program is in substantial compliance with the applicable statutes and regulations.

I should also reiterate that the evidence shows that as of February 28, 1969, only 284 persons were residing in the I-77 corridor in Projects A and B in the Triangle area of Charleston, West Virginia. It can be logically assumed that that number has been somewhat reduced in the period that has elapsed since February. In considering injunctive relief this court should, of necessity, weigh its possible beneficial effect upon this group of Triangle residents against its potential disruptive effect upon the program of the state and federal authorities charged with the responsibility of building east-west and north-south interstate highway corridors through West Virginia and the nation. The federal and state officials have assured the court that the persons residing in the interstate corridor in the Triangle will be dealt with in a manner that comports with the federal statutes and regulations, and I must assume that the highway officials gave these assurances in good faith. The evidence certainly supports such an assumption on my part.

The Constitutional Question

Plaintiffs further allege that even assuming that the State Road Commission's relocation program is lawful in other respects, it is being unconstitutionally administered insofar as it affects negro citizens residing in the I-77 corridor in the Triangle area. They allege that the dislocation of negroes into a "racially closed" housing market existing in Charleston constitutes a denial of equal protection of

the laws prescribed by the Fourteenth Amendment to the Constitution of the United States.

Without discussing this allegation in depth, I refer again to the representations made by the state and federal defendants to the court. They have assured the court that the relocation program can be carried out in complete compliance with existing law and that no racial discrimination will be practiced in the conduct of the program. Furthermore, I am satisfied from the evidence that the subject displacees from the I-77 corridor in the Triangle area can obtain housing within the range of their economic means without racial discrimination which would be of such a nature as to raise federal constitutional problems. It is clear that their greatest problem relative to housing is the basic lack of the financial means to secure such in many areas of Charleston. Many others, of all races, are faced with a similar problem, but this is not the result of invidious racial discrimination.

The evidence indicates that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor. I am satisfied that this evidence is accurate. Even should no housing be available for dislocatees in the private housing market, the evidence clearly demonstrates that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area.

Furthermore, evidence presented at the hearing on this matter suggests that some individuals in the subject corridor have refused offers of satisfactory and lawful relocation housing, unhappily in an attempt to further and improve the posture of this lawsuit. In at least one instance such refusal was at the request of counsel for plaintiffs

or their associates. This casts some question on the sincerity of the challenge plaintiffs have made to the relocation effort, and indicates that their primary objective is to block the interstate route which was finalized some five years ago.

Finally, it should be noted that the plaintiffs have specifically disavowed that there was any basic or specific racially discriminatory purpose on the part of defendants in the routing of I-77 or in the relocation of the displacees in that routing. There has been no showing that the location of this highway affects citizens of the negro race more adversely than it affects others in similar economic circumstances. That sufficient housing is available in the Charleston area to permit lawful relocation of all displacees, without regard to race, is sufficient to distinguish this case from the basic decision relied upon by plaintiffs, *Norwalk CORE* v. *Norwalk Redevelopment Agency*, supra. In that case the court ruled that a cause of action was stated when the plaintiffs alleged that the authorities were not even attempting to assure relocation for non-whites to the same extent as they were for whites.[1] In the present case

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[1] "We do not understand plaintiff's constitutional argument to be that defendants must end discrimination in the Norwalk open housing market through the relocation plan, or even that defendants must find integrated housing for those displaced by the Project. Those are arguments we need not consider until they are appropriately put to us.

"What plaintiffs' complaint alleges, in substance, is that in planning and implementing the Project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree." (395 F.2d at 930).

the evidence that all racial groups are being provided relocation assistance on the same basis and to the same extent precludes, in my view, any valid constitutional question on this facet of this controversy.

I conclude that plaintiffs' allegations relative to the relocation assistance program on both the statutory and constitutional grounds are without merit, and accordingly the defendants are entitled to judgment on the issues and the complaint should be dismissed. This opinion will be filed as my findings of fact and conclusions of law on the issues presented, and counsel may submit an appropriate order incorporating this opinion by reference therein.

/s/ JOHN A. FIELD, JR.

JOHN A. FIELD, JR.
United States District Judge

Dated: July 2, 1969

Order of District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON
CA 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA MCLENDON, JUDY ECKLES, HENRY G. HAYNES, and LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of Right of Way Division, State Road Commission of the State of West Virgnia; ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; JOHN VOLPE, individually and as Secretary of Transportation of the United States; LOWELL K. BRIDWELL, individually and as Administrator of the Federal Highway Administration of the United States and FRANCES C. TURNER, individually and as Director of the Bureau of Public Roads of the United States,

Defendants.

Order of District Court

ORDER

This day came the parties by their attorneys and for the reasons set forth in this Court's Memorandum Opinion, dated July 2, 1969, which Memorandum is hereby incorporated and made a part herein, it is ORDERED by this Court that defendants are entitled to judgment on the issues and the complaint should be dismissed.

Accordingly, it is ORDERED that the complaint be dismissed and that this matter be removed from the docket of this Court.

To all of which plaintiffs do hereby object and except.

ENTER:

July 18, 1969

/s/ JOHN A. FIELD, JR.
United States District Judge

/s/ JOHN BOETTNER
Counsel for Plaintiffs

/s/ L. ALVIN HUNT
Counsel for Defendants,
William S. Ritchie, etc., and
O. R. Colan, etc.

/s/ W. WARREN UPTON
Counsel for Defendants
Vo'pe, Bridwell and Turner

/s/ B. DUFFY HORAN
Counsel for Defendant Dodson
and for Defendants City of
Charleston and The City Council
of the City of Charleston

Notice of Appeal

(Title Omitted in Printing.)

Notice is hereby given that the TRIANGLE IMPROVEMENT COUNCIL, et al., plaintiffs named above, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order giving judgment to defendants and dismissing plaintiffs' complaint; entered in this action on the 18th day of July, 1969.

DATED: 8-25-69

/s/ JOHN L. BOETTNER, JR.
John L. Boettner, Jr.
Counsel for Plaintiffs
Charleston Legal Aid Society
702½ Lee Street
Charleston, West Virginia

Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of West Virginia.

ORDER

Appellants have moved to require the federal defendants (the Secretary of Transportation, the Federal Highway Administrator, and the Director of Public Roads) to produce a memorandum of the Secretary regarding new relocation policies. Upon consideration of appellants' motion, appellees' response, and appellants' reply, the court is of

the opinion that the document should be furnished to counsel and made a part of the record in this appeal. It is so ordered.

/s/ CLEMENT L. HAYNSWORTH
Chief Judge, Fourth Circuit

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ HERBERT S. BOREMAN
United States Circuit Judge

A True Copy, Teste:
Samuel W. Phillips, Clerk

By Beverly M. Newell
Deputy Clerk

FILED
APR 8 1970

SAMUEL W. PHILLIPS
CLERK

Opinion of Court of Appeals

[429 F.2d 423]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia.
John O. Field, District Judge.

(Argued May 6, 1970. Decided May 14, 1970.)

Before BRYAN and CRAVEN, Circuit Judges and JONES, District Judge.

Michael Davidson (Jack Greenberg, John Boettner, A. Andrew MacQueen, III, Thomas J. O'Sullivan, Peter M. Collins and Steve Young on brief) for Appellants, and Walter

H. Fleischer, Attorney, Department of Justice, (William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Wade H. Ballard, United States Attorney, L. Alvin Hunt, Stanley E. Preiser and Preiser, Greene, Hunt & Wilson on brief) for Appellees.

Per Curiam

We affirm on the opinion of the district court, —— F.Supp. —— (S.D.W.Va. July 2, 1969).

Affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiff-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from, in this cause, be, and the same is hereby, affirmed.

SAMUEL W. PHILLIPS
Clerk

FILED
MAY 14, 1970
SAMUEL W. PHILLIPS
Clerk

A True Copy, Teste:

Samuel W. Phillips, Clerk
By WILMA UPSHUR
Deputy Clerk

[SEAL]

Order Denying Rehearing *in banc* With Dissenting Opinion

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia. John O. Field, District Judge.

ORDER DENYING REHEARING IN BANC WITH DISSENTING OPINION BY SOBELOFF AND WINTER, CIRCUIT JUDGES.

JULY 14, 1970.

Before BRYAN and CRAVEN, Circuit Judges and JONES, District Judge.

Michael Davidson (Jack Greenberg, John Boettner, A. Andrew MacQueen, III, Thomas J. O'Sullivan, Peter M. Collins and Steve Young on brief) for Appellants, and

Order Denying Rehearing in banc With Dissenting Opinion

Walter H. Fleischer, Attorney, Department of Justice, William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Wade H. Ballard, United States Attorney, L. Alvin Hunt, Stanley E. Preiser and Preiser, Greene, Hunt & Wilson on brief) for Appellees.

Order Denying Motion for Reconsideration

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, ~~*et al.*~~,

Defendants-Appellees.

ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of the motion filed by the plaintiffs-appellants, Triangle Improvement Council, et al., for reconsideration of the opinion of this court announced on May 14, 1970, affirming the decision of the District Court, it is

ORDERED that the said motion be, and it is hereby, denied.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ J. BRAXTON CRAVEN
United States Circuit Judge

/s/ WOODROW W. JONES
United States Circuit [sic] Judge

FILED
JUL 14 1970

SAMUEL W. PHILLIPS
Clerk

Dissenting Opinion

Judge Sobeloff would grant the petition for rehearing, along with Judge Winter:

SOBELOFF, Circuit Judge, dissenting from the denial of a rehearing en banc: WINTER, Circuit Judge, joins in this opinion.

In light of the cryptic treatment given this appeal by the panel which decided it, I feel constrained briefly to set forth the issue, the panel's rationale, and the reasons for my disagreement.

The appellants are residents of Charleston, West Virginia's black ghetto, known as the Triangle, who will shortly be uprooted from their homes to make way for the construction of an interstate highway. They have now abandoned their futile efforts to halt or divert the road. Their sole objective at this point is to assure that when displaced they will be able to obtain adequate replacement housing, as guaranteed by federal law.

The plaintiffs' concern arises from a critical housing situation in Charleston. According to one study they cite, standard housing is only sparsely available for poor people generally, and hardly at all for poor blacks.[1] The problem of an ever shrinking housing supply has been grossly aggravated by a series of public projects, including highway construction, which have extensively eliminated housing facilities and continue to do so.

Despite informal promises made to them by state and federal officials that adequate housing will be available, the appellants are seriously apprehensive that when the time comes for them to move there will be nowhere to go

[1] Additionally, three memoranda of the federal right-of-way officer support this contention.

except to substandard, inferior quarters. It is for this reason that they demand that the state authorities comply fully with the federal requirement to submit a detailed, comprehensive relocation plan. Such a study, they say, will demonstrate that contrary to the representations of defendants, there are gross deficiencies in the housing potentially available to displacees. If the survey does support their claims there will be time before displacement to take steps, in conformity with federal law, to alleviate the problem.

The defendants assert that adequate replacement housing will exist, yet they reject the necessity for an analysis that would definitely test, either to contradict or corroborate, their assertion.[2] The sole issue on this appeal is whether

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[2] In response to this litigation the state authorities prepared a purported "relocation plan." This has not been reviewed by federal officials and there is no contention that it meets the federal standards for a sufficient plan. According to the appellants much of the proposed replacement housing referred to in the plan is either far above the financial eligibility of the displacees, not available to black people, or already occupied. Furthermore, the plan, it is said, gives no consideration to the competing demands of displacees from outside the Triangle area. Whether or not appellants' allegations are true, it is clear that any lacunae that exist in this "plan" would be filled by the federally mandated one. See note 3, *infra*.

Instead of furnishing a comprehensive plan, the defendants now rely on the District Judge's finding that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor." The plaintiffs dispute the finding and, moreover, point out that it is not up to us, nor was it for the District Court, to weigh the validity of the state's relocation program. Under the 1968 amendments, which the plaintiffs insist are applicable, there is a precise, effective administrative procedure for evaluation of the adequacy of proposed replacement housing.

If the 1968 amendments are indeed applicable, this case would seem, in light of the defendants' conduct during this lawsuit, note 6, infra, to be a particularly appropriate one in which to insist upon strict compliance with the letter of the law.

federal law requires submission of a detailed relocation plan as insisted by appellants.

In 1968 Congress recognized the predicament of poor persons whose homes are destroyed to make way for a highway, with no provision of alternative accommodations. Thus the Congress passed extensive amendments to the Federal-Aid Highway Act to provide for the "prompt and equitable relocation and reestablishment of persons" displaced by federal highway programs. 23 U.S.C. § 501. Theretofore no duty was owed to displaced persons save to furnish them information. 23 U.S.C. § 133. The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal. Under the new provisions, enacted to alleviate the inequity the Secretary may not approve a highway project unless he receives "satisfactory assurances" that, inter alia, prior to displacement, there will be available in adequate number and within the financial means of displaced persons "decent, safe and sanitary dwellings." 23 U.S.C. § 502.

What constitutes "satisfactory assurances" has been defined by regulation. They may not be merely vague or general promises. Instead, the statute and the regulations adopted pursuant thereto make mandatory a plan of relocation which describes the methods and procedures to be used and specifies detailed data concerning the replacement housing to be provided. There must also be a report probing relocation problems, analyzing other public programs affecting the availability of housing, furnishing information on concurrent displacement caused by other agencies, estimating the time required to accomplish the plan, and demonstrating that the plan is adequate "to carry out a timely, orderly and humane relocation program." IM-80-1-

68-(7) (b).[3] It is this accumulation of proposal and fact that enables federal officials to review the plan to determine whether

> [t]he State's relocation plan is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing with minimum hardship on those affected. IM-80-1-68-(5)·(a).

Approval by the Secretary is necessary at two junctures of a project; first before right-of-way acquisition and then again before actual construction. 23 U.S.C. §106; *Policy and Procedure Memorandum* 21-5. Rights-of-way for the projects involved in this case were authorized in 1966 and 1967. However, there has yet to be final approval of the construction phase. Thus it would seem that the above described requirement of a thorough plan must be fulfilled before construction in the Triange may proceed.

---

[3] IM-80-1-68-(7)(b) provides:

> The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:
>
> (1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.
>
> (2) The method and procedure by which the State will assure an inventory of currently available comparable housing which is decent, safe, and sanitary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13i), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

Dissenting Opinion

The defendants, however, argued that the 1968 amendments do not apply to any project in which any approval of the Secretary (either for acquisition or for construction) was obtained prior to 1968. Thus, since acquisition authorizations were obtained in 1966 and 1967, the argument ran, the new relocation provisions are inapplicable here. Defendants based their interpretation on a Department of Transportation regulation providing that

> assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. [September 1968]. IM-80-1-68-(5) (b).

The plaintiffs objected that this reading of the statute, resulting in the disregard of the 1968 relocation amendments in respect to 1970 displacements, is inconsistent with the plain statutory language, the legislative history, as well as other Department of Transportation regulations.

The District Judge accepted the defendants' view. In doing so he relied on *Udall* v. *Tallman*, 380 U.S. 1 (1965), which held that courts should show "great deference to the interpretation given the statute by the officers or agency charged with its administration" and should sustain those interpretations unless unreasonable. Accordingly, he found that "the agency's determination had a rational basis and should not be disturbed." This holding a panel of this court embraced in its one-sentence affirmance "on the opinion of the District Court."

However, subsequent to the opinion of the District Court the federal authorities issued new guidelines. These declarations, a policy directive of the Secretary of Transpor-

tation[4] and an implementing memorandum of the Federal Highway Administration,[5] reveal that federal regulations no longer subscribe to the view of limited applicability of the 1968 amendments. Rather, the new policy makes clear that, as interpreted by the Department of Transportation, the amendments pertain to all approvals of construction, even when projects have been previously authorized. Accordingy, since an appellate court "must apply the law in effect at the time it renders its decision," *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969),[6] then precisely for the reasons the District Court (and then the panel) accepted the now discarded interpretation, this court is obliged to adopt the more, recent view.

It remains to inquire why this court has not acted on these developments. The initial panel opinion, adopting the reasoning of the District Court, logically cannot serve to answer this question because the new administrative regulations came after the opinion below. The opinionless order denying a rehearing provides no further elucidation. It is therefore necessary to set out the panel's view as I infer it to be. There is, of course, no dispute within the court that the appellants' position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved. Rather, my brethren seem to think that the new regulation, expressly recognizing the

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[4] Memorandum of Secretary of Department of Transportation: Implementation of Replacement Housing Policy, January 15, 1970.

[5] Federal Highway Administration Circular Memorandum: Relocation Assistance—Availability of Replacement Housing, March 27, 1970.

[6] It was on this theory that a separate panel of this court, consisting of Judges Haynesworth, Boreman and Sobeloff, ordered the federal defendants, who had resisted, to produce the Memorandum of the Secretary.

plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief. Their position apparently is that there is no reason to suppose that the new policy will not be applied to the Triangle and, accordingly, appellants' claim is thus mooted, at least for the time being.

I cannot subscribe to this expectation. The question is anything but moot. The defendants have consistently taken the position, both before and during the litigation, that the state authorities need not submit and the federal officials need not review a formal relocation plan. They have continued to press this contention on appeal in spite of the policy change of which they were aware. Moreover, they have been less than forthright in the course of this litigation. They resisted, without justification, producing the very memorandum of the Secretary that announced the new position and did not supply it until ordered to do so by the court. Under these circumstances I cannot think that court-ordered relief would be superfluous. On the contrary, the defendants' refusal to accord the plaintiffs' their rights cries out for redress.

Nor do I perceive any justification for the cavalier treatment accorded the appeal and the petition for rehearing. Even if injunctive relief is not appropriate this court should not, by its silence, permit any possible implication that the obligations on the defendants have not been altered since the District Court's order. As I understand it, the affirmance is based on confidence that the defendants will perform their duty, not that they have none to fulfill. When the court acknowledges the duty but without explanation does nothing to enforce it, the decision will be read by some as a holding that there is no duty. At the very least the court should have explicated its rationale to underscore the obligation and prevent misreading. Its failure to do so constitutes serious error.

Plaintiffs' Exhibit No. 9

U.S. Department of Transportation
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

West Virginia

January 23, 1968

Circular Memorandum to: Regional Federal Highway Administrators and Division Engineers

From: F. C. Turner, Director of Public Roads
39-20 Washington, D. C.

Subject: Relocation Advisory Assistance Services

The Federal-Aid Highway Act of 1962 inaugurated a new administrative responsibility for Public Roads—that of monitoring a requirement for all State highway departments to give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway. As a follow-up action, Congress directed (Re: Section 12, Federal-Aid Highway Act of 1966) that a study be made of the current highway relocation assistance program and ways to improve the service. As you know we, with the cooperation of the States, have completed the study for Congress. The July 1967 report was transmitted to you with my September 14 circular memorandum. This report clearly delineates the nature and dimensions of the national highway relocation problem.

There continues to be a substantial number of complaints to the President, Congress and public news media, which

indicates to me that we need to reexamine the procedures and practices which are used to meet the intent of the 1962 Act. This simply means that we, as highway professionals, must increase our attention to the problem. We have created a national highway system second to none. We need now to apply the same initiative and creative imagination to care for the highway displacees. Equal importance must be attached to planning for the relocation of displacees as is done for the highway improvement. By so doing, we would in addition to substantially improving the quality of current relocation services, materially strengthen public acceptance of the highway program.

Notwithstanding full, or partial, congressional implementation of the ten recommendations in the report, it will be incumbent on both the States and Bureau alike to give maximum attention to relocation assistance services in the future. While the recommendations, if enacted, will greatly facilitate or ease our task, we are still faced with the relocation of some 168,500 individuals, families, businesses, farmers and nonprofit organizations in the ensuing two and one-half to three-year period.

About 87 percent of those involved will be individuals or families, who will be displaced from their homes to make way for new or improved highways. Your attention is directed to page 42 of the report for an assessment of the proportionate amount of relocatees in your individual region-division(s).

New legislation is not necessary to immediately implement some of the recommendations made in the above study. For instance, several steps should be taken now to substantially upgrade the quality of the State's relocation services: Recommendation five, the relocation plan concept, should

be implemented particularly in an urban area where there is a large number of families and businesses to be dislocated. The development and/or encouragement to construct low cost housing, recommendation number six, also may be successfully and voluntarily implemented without new laws in some situations. Recommendation seven reemphasizes the adverse affects of inadequate right-of-way leadtime practices, which require our continuing attention. It is requested that you reevaluate the State's program, in light of the congressional relocation assistance study, and discuss your findings with responsible State officials. While the urbanized States will have a large volume of displacees, it should be clearly emphasized that rural States have the same probems even though they may not be as great in scope. The intent of Congress was not to segregate urban from rural displacees. Every individual, family, or business must receive full and responsive treatment to insure full public acceptance of the highway program.

Subsequent to such a review, I request that you advise me of steps the State intends to take to give maximum emphasis to its relocation assistance program.

Plaintiffs' Exhibit No. 9

Mar 25 1968

Mr. August Schofer
Regional Federal Highway Administrator
Baltimore, Maryland

02-46

Morris E. Monroe
Division Engineer, Charleston, West Virginia

Relocation Advisory Assistance Service

Mr. Turner's Blue Circular Memorandum of January 23, 1968 requested that he be advised of steps the State intends to take to give maximum emphasis to its relocation assistance program. We subsequently requested that the State Road Commission re-evaluate its relocation program in light of the Highway Relocation Assistance Study with specific comment regarding the ten recommendations included therein. In addition we requested their comment on six additional questions relative to their relocation program in Charleston where they are about mid-way through a large relocation program.

Attached hereto is the State's response which is self-explanatory. We generally agree with the response, however, the following additional comments are offered:

1. The State cannot, by virtue of existing law, provide any relocation payment to a business if a substantial portion thereof relocates out of State. Business moves are additionally restricted to a 50-mile limitation. Experience indicates that the $3000 limit on business moves is adequate under the present relocation concept.

2. We concur with the State's comment regarding the need for a relocation plan for every urban project. It

Plaintiffs' Exhibit No. 9

would appear that the need for a formal relocation plan would be related in some manner to the number of dislocations which would be created by a given project.

In the Charleston area the State did secure valuable information relative to persons to be dislocated by a survey which was a valuable assist in defining the overall problem involved. It would not be considered, in our opinion, a complete relocation plan since it did not provide information either factual, estimated or projected as to the availability of replacement housing.

3. There appears to be a need for guidelines that would tend to insure coordination between governmental agencies involved in displacement.

The State Road Commission has taken some initiative in coordinating with other agencies, however, we believe this coordinated effort will improve. It also appears that improvement could be realized if Federal agencies were better coordinated.

The State Road Commission proposes to enlarge its Relocation Assistance Section which should greatly improve its overall effectiveness.

We have recently completed an Inspection-in-Depth covering relocation assistance. Upon clearance from our Regional Office we propose to take it up with appropriate State personnel.

GBSaunders:efc 3/25/68
cc: R/W, Reading

Plaintiffs' Exhibit No. 12

Form FH-121 (4-67)

UNITED STATE GOVERNMENT

MEMORANDUM

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS
DATE: February 20, 1968
In reply refer to:

To : Morris E. Monroe /s M E M
Division Engineer, Charleston, W. Va.

FROM : Gerald B. Saunders /s G. B. Saunders
Division Right-of-Way Office, Charleston, W. Va.

SUBJECT: Relocation Assistance

Accompanied by Mr. John Wineberg of this office, I met with Mr. Eric Hemphill, Executive Director, Urban Renewal Authority, and Mr. Ned Henry, Relocation Director, to discuss the impending relocation problem which we believe may exist in the Charleston urban area. Mr. Elmer Patton, State Central Office Relocation Manager, was also in attendance.

The basic objective of this meeting was to ascertain:

1. If there are any definite plans contemplated by Urban Renewal which would serve persons dislocated as a result of highway acquisition.
2. If any plans along this line have been developed, when they will be implemented and completed.

Plaintiffs' Exhibit No. 12

3. A comparison of the Urban Renewal relocation policies and procedures with those of the State Road Commission to determine if they are substantially uniform and if not where major differences exist.

4. If there are any areas where the Urban Renewal Authority and the State Road Commission can refine their respective relocation programs through a joint coordinated effort.

5. To determine if the Urban Renewal representatives could provide advice for improving the highway relocation program based upon their past experience in the Charleston urban area.

For the most part, it was my observation that the differences in the relocation problems of the State Road Commission and Urban Renewal would not permit a very effective coordinated relocation program. For example, the relocation of people by the Urban Renewal Authority is generally restricted to persons of very low income and these relocatees are provided replacement housing superior to that taken. This differs from the highway relocation program where dislocatees are made up of differing economic backgrounds and there is no authority for the State Road Commission to construct replacement housing. The major area of similarity between the two agencies insofar as the relocation assistance objective is concerned centers around those who will need replacement low cost public housing.

We discussed the two proposed Urban Renewal projects commonly known as the "Government Square Complex" and the "Triangle Complex". These two projects have not

been formally approved. However, the "Triangle" project has been submitted for approval and the same should be forthcoming within the year. It is Urban Renewal's estimate that actual relocations of people, as a result of the "Triangle" project, will commence in early 1969 and involve a total relocation problem of 600 families and individuals. It is reasonable to conclude that this Urban Renewal project will be active during the same time that the State is confronted with highway relocation and will further complicate the total relocation problem for both agencies.

In our discussion as to how the proposed Urban Renewal projects might be an assist to the State in their relocation problem, it was concluded that it will be of little if any benefit due in part to the projected completion date which would fall sometime after 1970.

We also discussed the availability of any other sources of available replacement housing, and it was found that various programs have been instituted whereby approximately 1600 units should be available at unspecified future dates. At the present time, the Urban Renewal representatives know of only approximately 50 units that are proposed for construction in the near future. Here again, it was my observation that even these units will not be available in time to serve persons dislocated by the proposed Interstate highway facilities. The Urban Renewal representatives indicated that they estimated the present turnover in available public housing to be approximately 30% of the total of 800 units. This means then that there are approximately 240 vacancies in public housing on an annual basis. I have no support for the fact that this is an excessive estimate, however, it does appear to be somewhat high.

Plaintiffs' Exhibit No. 12

In the event that there are vacancies in public housing, highway dislocatees are given priority treatment. Up to this point, however, this has not been a major area of concern since the State has had good results in placing people in public housing units if they are qualified.

It is my opinion that our major area of concern lies with these people who have income over and above that which would qualify them for public housing and desire to rent. More specifically, this area would be defined as families with average annual incomes of from $5,000 to $7,500 a year and who do not want to, or cannot, buy their own home. Urban Renewal and public housing is of little value to our relocation problem in these cases, and I have reason to believe that the private housing market is about saturated presently.

It was agreed that a meeting would be set up in the near future to discuss the availability of proposed low cost rental property since there are several public and private programs endorsed by the City under Federal Housing Administration regulations in this regard. It is expected that the State Road Commission, Urban Renewal, the City of Charleston, Federal Housing Administration and Bureau of Public Roads will be in attendance. I believe this meeting will, if nothing else, emphasize the need for closer coordination between the State Road Commission and other agencies, particularly in the "Triangle" area where the State Road Commission and Urban Renewal will be encountering a common relocation problem in the not too distant future.

ss: Reading, R/W(2), GBS
GBSaunders:pgj:2/20/68

Plaintiffs' Exhibit No. 12

Form FH-121 (4-67)

UNITED STATES GOVERNMENT

MEMORANDUM

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS

DATE: February 26, 1968

In reply refer to:

To : Morris E. Monroe /s Morris E. Monroe
Division Engineer, Charleston, West Virginia

FROM : Gerald B. Saunders /s G. B. Saunders
Division Right-of-Way Officer,
Charleston, West Virginia

SUBJECT: Relocation Assistance, Charleston Urban Area

A further detailed review has been accomplished relative to the State's Relocation Assistance Program in the Charleston urban area. This report will include various statistics which, in some cases, are estimates; others are accurate as of mid-February. For purposes of clarification and ease of understanding, this report is broken down into three basic parts:

1. Summation of the relocation problem.
2. Extent of replacement housing for displaced families.
3. Conclusion.

Plaintiffs' Exhibit No. 12

SUMMATION OF RELOCATION PROBLEM

There exists approximately 950 families to be dislocated in the Charleston area. Approximately 550 of this number are located in Charleston proper and 150 presently reside in the South Charleston area. The remainder are located north and east of Charleston proper. It is estimated that the majority of the relocation will take place in 1968, 1969 and be completed in early 1970. The relocation work-load will therefore require locating replacement housing for approximately 400 to 500 families per year based upon an estimated future projection. In the report of February 19, 1968, it was pointed out that two urban renewal projects are being finalized, one of which (Government Square Complex) is in Washington for approval. These two projects call for acquisition to be underway in the near future. They require the relocation of approximately 750 families and individuals. Additionally, the City of Charleston will be relocating some families as a result of housing becoming unsafe and not considered suitable for further human habitation. The number in this category is unknown, however, it appears reasonable to conclude that 60-75 such cases will be involved annually or 120-150 for a two—two and one half year period.

It therefore appears reasonable to estimate the following dislocations:

SRC	—950	1968—1969—1970
U.R.	—756	1969—1970—1971
City	—120	1968—1969
Total	1,826	

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Logically, the next question involves locating replacement housing. It would appear that the following points are appropriate in this regard:

1. The City does not face a definite timetable for relocation. In other words, they can defer relocation until replacement housing can be located.
2. Urban Renewal replaces housing and therefore a substantial number of their dislocatees can be rehoused in newly constructed units.
3. The State Road Commission basically has to find replacement housing provided by either private and/or public sources over which they have no firm control. They additionally are confronted with a time problem during which period all relocation is scheduled to be accomplished.

The average price range of housing to be acquired by the State Road Commission in Charleston falls between $14,000 to $15,000. In Charleston Proper, approximately 65% of the relocatees are tenants and 35% are owners. An estimated family income in the West Side falls in the $5,000-$6,000 range.

AVAILABLE REPLACEMENT HOUSING

The below listed statistics were developed through consultation with State Relocation personnel and are indicative of findings of mid-February 1968.

SALE—HOUSING

Multiple Listing Service has 162 houses in the $10,000 to $20,000 range; 43 in the $20,000 to $25,000 range; 245 over $25,000 and 8 under $10,00. The State, through other sources, has found:

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1. 50 houses under $10,000.
2. 86 houses between $10,000 to $25,000.

The number of housing units located by the State is concluded to be somewhat high, possibly by 20%. The priority listing provided by the Federal Housing Administration indicates only one house is currently available, with 4 on a preliminary listing that will be available in the near future.

Housing for sale is summarized below:

58	Under $10,000
291	$10,000—$25,000
245	Over $25,000
*594	Total

*Excluding a maximum of 5 under FHA control and others not available for reasons of being under construction, etc.

RENTAL UNITS AVAILABLE

The State Relocation Offices have available the following rental units:

Number of Bedrooms	*Available Units*
1	20
2	24
3	12
4	5
Total units available	61*

*Excludes newspaper listings which normally average 20 units.

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Price Range	*Number of Units*
Under $40 per month	1
$40—$60 per month	21
$61—$80 per month	16
$81—$100 per month	8
$100—$125 per month	10
Over $125 per month	5
Total Units	61

The location of available replacement rental property falls by number in the following categories:

Charleston proper and immediate suburbs	53 units
Outside Charleston area and within 5 miles	8 units
Total	61 units

The estimated number of available units currently known broken down as to sale and rental property.

Housing for sale	600 units
Rentals	81 units
Total	681 units

The above rental includes approximately 80 units that are listed in the local newspaper.

The economic situation of persons to be relocated by the State Road Commission is portrayed below based upon a State survey with 77% reporting.

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Family Income (Annual)	*Number*	*Percent*
Less than $3,000	296	26%
3,001- 4,000	102	9%
4,001- 5,000	133	11%
5,001- 6,000	85	8%
6,001- 7,000	62	6%
7,001- 8,000	75	7%
8,001-10,000	66	6%
10,000-12,000	25	2%
Over 12,000	28	2%
Uncommitted	268	23%

The above is based upon 1,142 families which was the total number involved in the Charleston area, a number of which have already been relocated and no longer constitute any problem.

CONCLUSION

It appears that the relocation problem in the Charleston area, insofar as the State Road Commission is concerned, could become critical in the not too distant future due primarily to the apparent lack of rental property in the $60—$90 per month price range. The available replacement housing in this area is being depleted and no new sources are available at this time. In the event that Urban Renewal secures approval for their proposed project(s), the overall relocation problem will be further complicated.

A meeting (not scheduled) is proposed with FHA, Urban Renewal, City of Charleston, State Road Commission and Bureau of Public Roads representatives attending. The purpose is to ascertain the status of any proposed public and/or private low rent housing to be constructed under

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FHA guidelines. Several such projects have been considered, however, it does not appear that any noticeable amount will be available in time to benefit State Road Commission displacements.

The State Relocation personnel have worked continually in an attempt to minimize the problem. The fact that they have secured a substantial number of listings from sources other than newspapers, real estate firms, etc., indicates that they are attempting to provide assistance. This report is not intended in any way to criticize the State's efforts even though the required reports are not always completed to the desired degree.

I believe we are now in a position to present the overall problem to our Regional personnel when they visit this office, which should be forthcoming within the next few weeks. If they consider the situation serious, it would appear that the only possible solution centers around future authorizations for the State Road Commission to acquire right-of-way.

cc: Reading, R/W-2, CBS
GBSaunders:pgj:2/26/68

Plaintiffs' Exhibit No. 12

Form FH-121 (4-67)

UNITED STATES GOVERNMENT

MEMORANDUM

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS

DATE: March 6, 1968

To : Mr. Morris E. Monroe s/ Morris E. Monroe
Division Engineer, Charleston, West Virginia

FROM : Gerald B. Saunders s/ G.B. Saunders
Division Right-of-Way officer, Charleston, West Virginia

SUBJECT: Relocation Assistance — Charleston Area

A meeting was held in the City Building, March 4, 1968, with the following persons attending:

Eric Hemphill	Director, Urban Renewal
Ned Henry	Relocation Officer, Urban Renewal
Ted Wilding	City
Wayne Zunigha	City
James Haught	Director, Federal Housing Administration
Elmer Patton	Chief Relocation Advisor, State Road Commission
William Hall	Assistant Division Engineer, Bureau of Public Roads
G. B. Saunders	Division Right-of-Way Officer, Bureau of Public Roads

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Mayor Dodson sat in on a portion of the meeting.
The purpose of this meeting was to:

1. Establish an accurate estimate of persons to be displaced during 1968.
2. Ascertain the extent of replacement housing available for dislocatees.
3. Generally discuss the various governmental programs and/or action that will cause displacement.

It was concluded that the following displacements would likely occur in 1968:

State Road Commission	475 (includes Capitol Complex)
Urban Renewal	100
City	150
Total	725

Mr. Haught stated that approximately 625 low-rent units would be available in 1968 as a result of Federal Housing Administration programs. These would all be under a rent supplement program and would provide efficiency, one, two and three bedroom units. Rentals were estimated as follows:

Efficiency	$85 –95	per month
One Bedroom	$110–120	" "
Two Bedroom	$120–135	" "
Three Bedroom	$160	" "

The project locations are already established with sponsorship achieved. The sites are identified with the proposed number of units as follows:

Plaintiffs' Exhibit No. 12

Hilltop	150 Units
Hanna Road	250 Units
AME Church	225 Units

He was very optimistic that these units would be established this year without any difficulty.

He further stated that similar programs would be undertaken in the future which would provide additional housing if funds are allocated.

Some comment was offered on a new program identified as BMI (Below Market Interest). Units for this program would be supplied by the mobile home industry and placed on small lots. The total expenditure would amount to approximately $4,000 per unit, including land and living quarters (furnished). Profit was estimated at $500 per unit and $1,000 per acre would be allowed for land (including utilities). Sponsorship, including land, has been secured for 184 units with fund allocation being the remaining obstacle.

A likely objection to the 625 units of low-cost rent supplement housing scheduled for completion this year may involve their location. The projects are to be located in remote areas, some distance from the city proper. Most of the Interstate dislocatees are close in, with no transportation problem.

It is further anticipated that some resistance will be encountered because of the rent supplement feature which detracts from the independent attitude of persons who will need replacement housing.

It appears that the Federal Housing Administration programs will provide the only source of replacement housing

Plaintiffs' Exhibit No. 12

in the area. The existing private market, particularly in low to moderate priced rentals, is being depleted primarily by Interstate acquisition. It also appears that future authorization for acquisition will be affected unless the Federal Housing Administration programs are instituted in the very near future.

The advantages of future progress meetings were recognized to periodically evaluate the local housing problem. The Urban Renewal representatives indicated that they had no objection to working with the State Road Commission, exchanging information, etc., when they become involved in actual relocation for their projects.

Defendant Ritchie's Exhibit No. 1

I-77-3 (66) 100
and
I-77-3 (67) 98

Triangle Area Relocation Program Plan

TRIANGLE PROJECT REPORT

For the purpose of this report it will be necessary to establish geographical boundries which are affected by Interstate projects I-77-3(67)98 and I-77-3(66)100. The area in question is bound by Washington Street, Capitol Street, Piedmont Road and Elk River (See Exhibit I).

An analysis was made on the needs of the individuals and families to be displaced by the two Interstate projects. A survey was also made of available housing in the area meeting the requirements of decent, safe, and sanitary, and the needs and requirements of the persons to be affected were then related to the available housing giving consideration to rents, properties for sale, and places accessible to employment.

As a part of The State Road Commission's continuing relocation program the inventory of available decent, safe, and sanitary housing within the price or rent range of these families and readily accessible to their places of employment will be maintained during the relocation process. The State Road Commission will maintain personnel to meet the families to be relocated to assist them in finding such decent, safe and sanitary housing available through surveys as more particularly set forth on Form R/W 12.12.

The Triangle Area (as set out in Exhibit I) has approximately 2,000 residents. The proposed Interstate Highway improvements will ultimately result in the displacement of approximately 300 of these individuals. As of

today approximately 17 of these households have moved there are 116 individuals remaining and approximately 59 families.

Local, State and Federal agencies were contacted as to any projects which might be contemplated in the triangle area. The West Virginia Water Company has already displaced approximately 243 individuals or (81) families. The displacement was for a new water filteration site. The selected site has been challenged however; the Water Company contends that the selection was predicted upon extensive engineering studies which dictated the advisability of this particular location, it should be noted also that the Triangle Improvement Council has petitioned the City of Charleston to rezone the property for residential use in order to provide for more housing in the area. This parcel has been cleared for approximately 2½ years.

The Urban Renewal Authority is presently completing plans for a project which will also create, at least initially, a sigmificant number of displacements in the Triangle Area. It is contemplated that the Urban Renewal will acquire the majority of the property in the Triangle not taken for the proposed Water Site and Interstate facilities. The northeastern boundry of the Urban Renewal Project generally coincides with the southwestern Interstate right of way line. The Urban Renewal project in the Triangle area will ultimately displace approximately 1,500 or 619 household units, The Government Square project will ultimately displace 130 households.* Based on past experience relocation for the highway will be completed or substantially completed prior to any significant displacement for the Urban Renewal project.

In summary, the proposed highway project considered alone will have a moderate affect upon the local Triangle

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* Under Renewal information obtained from Mr. Miles of Charleston Urban Renewal Authority.

Defendant Ritchie's Exhibit No. 1

Area and little affect on the entire local community. Considered collectively with the proposed Urban Renewal project the result in effect will be substantial as the entire Triangle Area will be completely transformed.

The estimated amount of lead time required for this project is 16 months from February 28, 1969. There will be adequate personnel in the local District office to carry out a timely, orderly, and humane relocation program. No person lawfully occupying real property on this project shall be required to move without at least 90 days written notice. Relocation assistance will be provided exclusively by The State Road Commission of West Virginia on all Interstate projects.

Of the approximately 175 households remaining in the Triangle Area, 166 are tenants and approximately 9 are owner occupants. Of the above figures 116 are individuals and 59 are families.

The 166 tenants pay an average rent between $45.00 and $50.00 a month. The average rent of available units on the private market is approximately $90.00 per month. This would tend to indicate that the majority of the tenants in the Triangle Area would be eligible for supplemental payments not to exceed $1,500.00. The $90.00 a month is based on approximately 80 private listings which were secured from Real Estate Brokers, Banks, Newspaper, and generally canvassing the Charleston area. These 80 listings would be available on any given day. Theoretically, as soon as one is rented another similar unit will become available. During two (2) years of extensive relocation in Charleston, the number of available units has not changed substantially. The 80 units we are considering are units which with a supplemental payment will be within the financial means of the individuals being displaced, most are adequate for these families and convenient to public transportation and employment. There are numerous

rentals available in the Charleston area which are in the $125.00 and *up* category, however, these units would not be within the financial means of the displacees with the maximum supplemental payment. The majority of the displacees on the Interstate projects within the geographical boundaries of the Triangle appear to be eligible for public housing. In the Charleston area there are four (4) existing Public Housing Projects, (1) Lee Terrace, which was just recently constructed, is for the elderly, (2) Washington Manor, (3) Orchard Manor, (4) Little Page Terrace. These four (b) Public Housing Projects make up 934 units, there is a turnover of approximately 30 per cent per year or approximately 239* units a year will be available to qualified individuals. Interstate relocatees receive priority in such Public Housing. Therefore, throughout the span of the acquisition process there will be approximately 319* Public Housing units that will come onto the market; as well as on any *given day* throughout the same period of time there will be at least 80 rental units within the financial means of the people being displaced with an addition of a supplemental payment. (See Exhibits #2 and #3) which shows the amount of rent paid by the 166 tenants with a percentage breakdown on the number of units being rented, Exhibit #3 shows the number of available units with a breakdown of rental values and a breakdown of dwellings for sale in the Charleston Metropolitan area.

The owners in the Triangle area, which is approximately nine (9) families, should have no relocation problems. We have approximately 800 listings for sale in the Charleston area. On this figure approximately 450 are in the Multiple Listing Service, 175 listings which were secured by The State Road Commission's Replacement Housing Section,

* See attached report from Public Housing Authority.

and another approximately 175 listings of brokers who do not belong to the Multiple Listing Services or who do not list expensive housing in Multiple Listing.

It is our opinion that adequate decent, safe, and sanitary replacement housing will be made available to The State Road Commission displacees, however, it is acknowledged that this factor could become a problem in some cases for the following reasons:

1. The social environmental desires of some of the individuals involved may restrict the number of available choices acceptable to the displacee for replacement housing. The additional monetary allowances set out in the 1968 Highway Act will be beneficial and each displacee will be offered adequate decent, safe and sanitary housing which meets federal requirements. However, we are unable to conclusively state that every social and environmental situation will be completely resolved. There are individuals on these projects who would not readily accept other areas due to their social, economic and environmental desires regardless of their race, color or creed. The answer to many of the relocation problems in the Triangle Area will be answered by Public Housing accommodations, however, the Triangle Improvement Council has promoted a resistance to Public Housing relocation and if they are successful in this respect, the State relocation problem will be accordingly increased.

2. At the present time The State Road Commission is meeting some resistance on the part of a few organizations and individuals who in some cases do not even live in the Triangle area.

The State Road Commission is well aware of existing potential relocation problems in the Triangle Area. However, a field office staffed with qualified relocation personnel is readily accessible to residents and contact is being made

with them at appropriate stages of acquisition. Every effort is being made to minimize hardships, and several specific instances are noteworthy where unique assistance was provided by the State in achieving necessary relocation.

The State Road Commission realizing the relocation problems in this particular area is taking the following steps in an attempt to insure an orderly relocation program in the Triangle Area:

1. The States does not and will not resort to eviction for the purpose of clearing the project, unless the occupant has refused adequate decent, safe, and sanitary housing meeting current criteria and reasonable efforts to relocate the occupant have been rejected by the occupant.

2. Special rent collection procedures to comply with the Triangle Improvement Council suggestions, which differ from those typically employed, have been instituted in the Triangle Area for tenants renting State acquired improved residential property. To date these measures have been generally ineffective insofar as rent collection is concerned.

3. The clearance program in the Triangle Area has been and will continue to be undertaken in an orderly manner in order that the replacement rental market will not be pressed thereby creating hardships on the occupants.

4. As relocation increases additional experienced relocation personnel will be assigned to the area.

We have complete confidence in our capabilities to properly relocate persons from the area into adequate decent, safe, and sanitary housing based upon past experience in successfully relocating several thousand persons, and based upon our continuing review of the practices and procedures employed, we are confident that a reasonable and orderly relocation program can and will be followed in the Triangle project.

ROBERT E. SCOTT, JR.

W A S H I N G T O N M A N O R

PROJECT WVA 1-1 - 304 UNITS

Calendar Year	Quarters 1967	Turnover Move-Ins	%--1/4 quarterly	% Yearly	1 BR	2 BR	3 BR	4 BR	Total
	1-3	13	4.3%		4	9	0	(Not applicable)	13
	4-6	16	5.3%		4	12	0		16
	7-9	11	3.5%		4	7	0		11
	10-12	13	4.3%	17.4%	1	12	0		13
		53	17.4%		13	40	0		53
Calendar Year	1968								
	1-3	8	2.6%		4	4	0		8
	4-6	6	2.0%		1	5	0		6
	7-12	35	11.5%	16.1%	5	30	0		35
		49	16.1%		10	39	0		49

L I T T L E P A G E T E R R A C E

PROJECT WVA 1-2 - 170 UNITS

Calendar Year	Quarters 1967	Move-Ins	Turnover %--1/4 quarterly	% Yearly	1 BR	2 BR	3 BR	4 BR	Total
	1-3	8	4.7%		5	3	0		8
	4-6	7	4.1%		1	6	0		7
	7-9	18	10.6%		5	13	0		18
	10-12	10	5.9%	25.3%	3	5	2		10
		43	25.3%		14	27	2		43
Calendar Year	1968								
	1-3	10	5.9%		2	7	1		10
	4-6	15	8.8%		4	10	1		15
	7-12	24	14.1%	28.8%	7	15	2		24
		49	28.8%		13	32	4		49

(Not applicable)

O R C H A R D M A N O R

PROJECT WVA 1-3 - 360 UNITS

Calendar Year	Quarters	Turnover Move-Ins	%--1/4 quarterly	% Yearly	1 BR	2 BR	3 BR	4 BR	Total
	1967								
	1-3	34	9.4%		1	16	9	8	34
	4-6	39	10.8%		1	23	7	8	39
	7-9	47	13.1%		0	21	15	11	47
	10-12	29	8.1%	41.4%	1	21	3	4	29
		149	41.4%		3	81	34	31	149
Calendar Year	1968								
	1-3	14	3.9%		1	7	2	4	14
	4-6	42	11.7%		2	20	8	12	42
	7-12	85	23.6%	39.2%	1	55	16	13	85
		141	39.2%		4	82	26	29	141

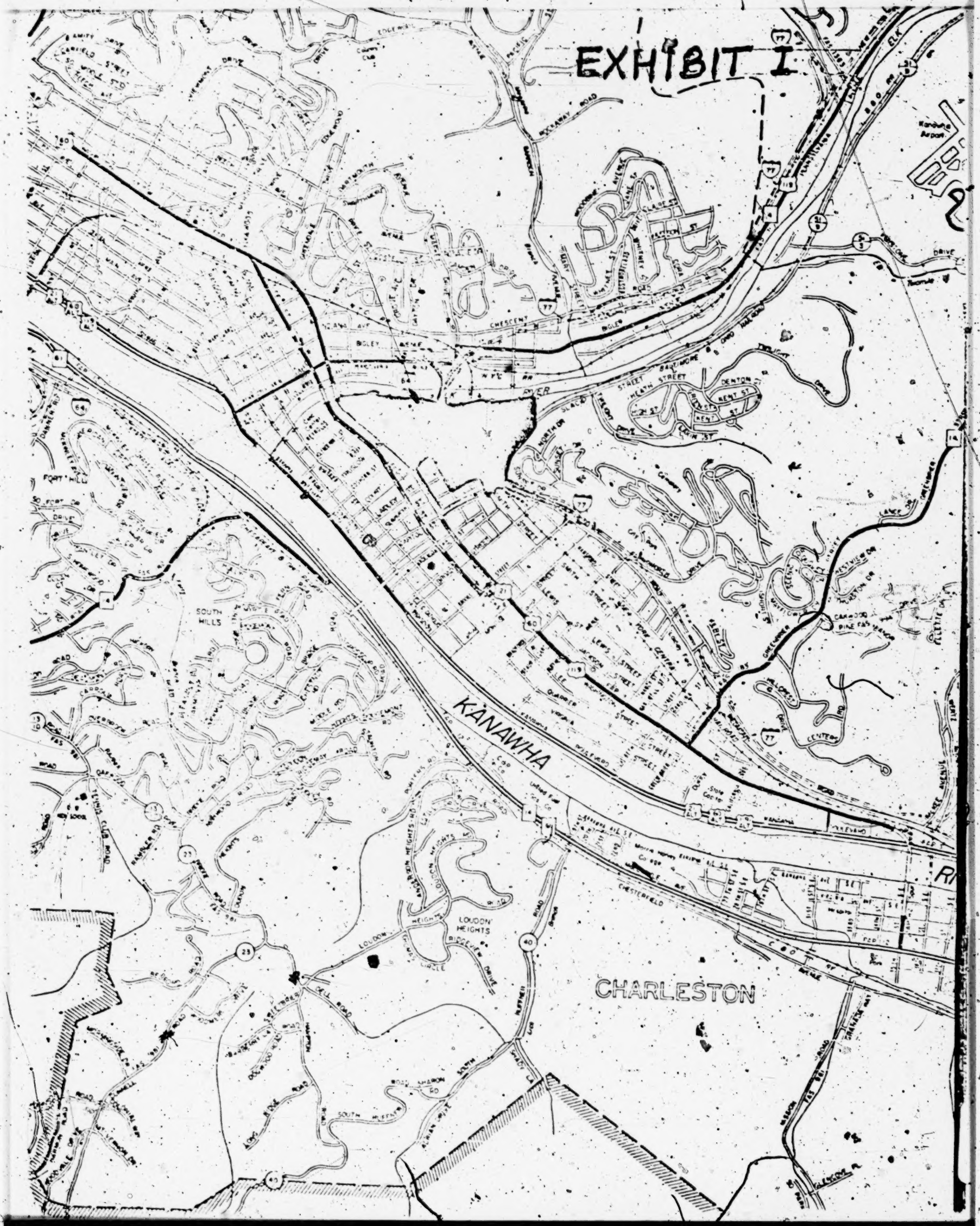
R E C A P I T U L A T I O N A L L P R O J E C T S

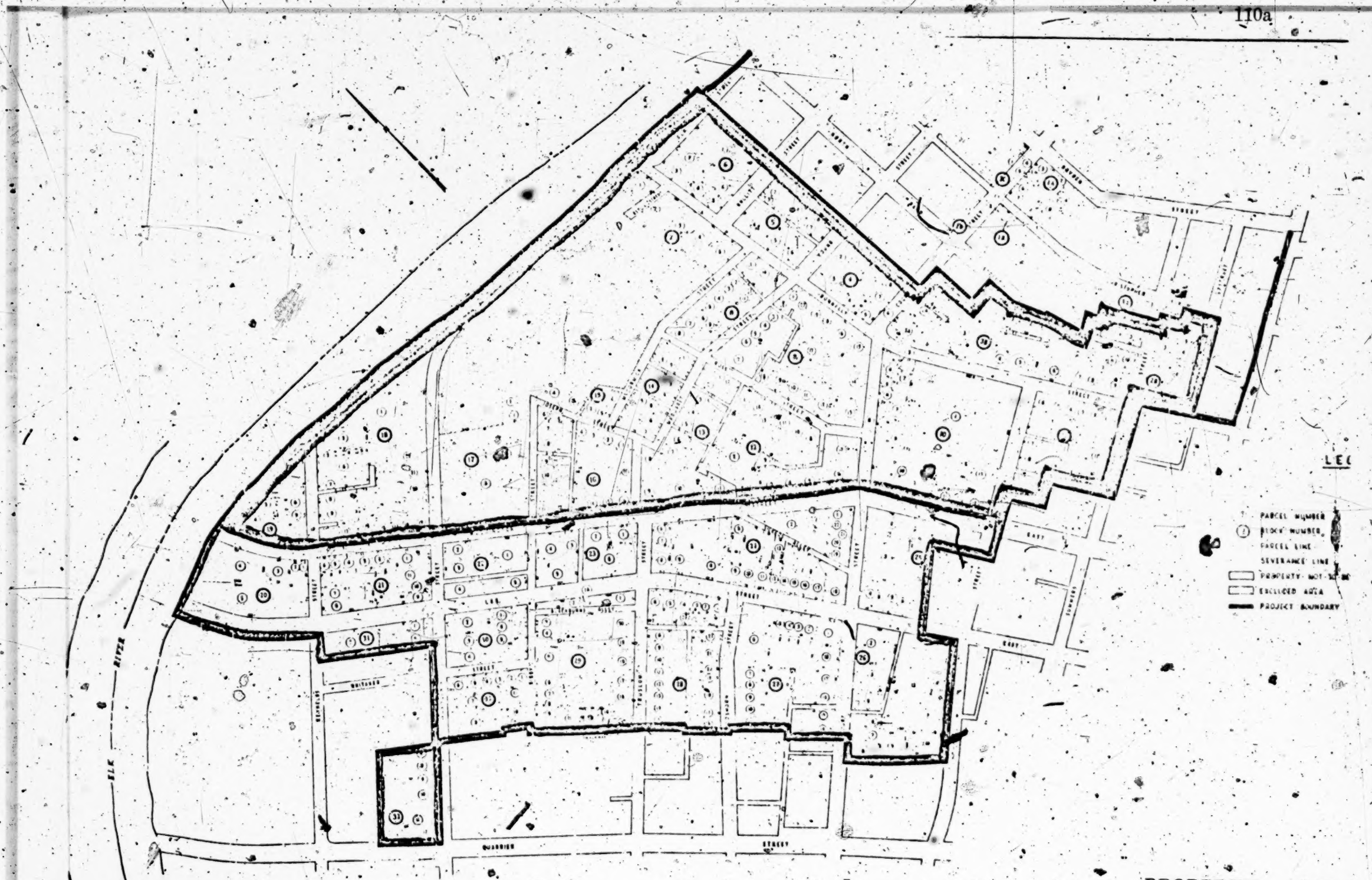
Calendar Year	Total Move-Ins	% Turnover
1967	245	29.4%
1968	239	25.6%

Turnover - By Bedroom Size

Calendar Year	1 BR	2 BR	3 BR	4 BR	Total
1967	30	148	36	31	245
1968	27	153	30	29	239

EXHIBIT I


KANAWHA
CHARLESTON
SOUTH HILLS
LOUDON HEIGHTS
BIGLEY AVENUE
CRESCENT
DIGLEY
MYRTLE
HEATH STREET
BALTIMORE
DENTON ST
KENT ST
LEWIS ST
LEWIS STREET
QUARRIER
VIRGINIA
WASHINGTON
CHESTERFIELD
CENTER
CAMDEN PINE VALLEY
KANAWHA AIRPORT
FORT HILL
SOUTH MIDLAND
ROSE ABARON RD
LOUDON HEIGHTS CIRCLE
RIDGEVIEW DRIVE
CHESTERFIELD ROAD
ELK
RIVER



S.R.C. PROJECT BOUNDARY
URBAN RENEWAL PROJECT BOUNDARY

PROPERTY MAP

TRIANGLE URBAN RENEWAL PRO

PROJECT NO. W. VA. R-21

CHARLESTON URBAN RENEWAL AUTHORITY
CHARLESTON, WEST VIRGINIA

BALZER & ASSOCIATES
HAYES, SEAY, MATTERN & MATTERN ARCHITECTS
DATE
REV

TRIANGLE AREA

AMOUNT OF RENT PAID

TOTAL NUMBER OF ROOMS	$20-30	$31-40	$41-50	$51-60	$61-70	$71-UP	TOTAL
1	7	66	2	0	0	1	76
2	3	3	1	3	0	0	10
3	4	5	3	1	0	1	13
4	1	6	11	3	0	1	22
5	4	4	10	2	2	2	24
6	0	1	7	9	3	0	20
9	0	0	0	0	0	1	1
TOTAL	19	85	34	18	5	5	166

FAMILIES 175

% ROOMS

1 = 45.8%
2 = 6.0%
3 = 7.8%
4 = 13.3%
5 = 14.5%
6 = 12.0%
9 = 0.6%

PERCENTAGE OF RENT

$20-30 = 11.5%
$31-40 = 51.2%
$41-50 = 20.5%
$51-60 = 10.8%
$61-70 = 3.0%
$71- Up = 3.0%
100%

AVAILABLE RENTALS

$0-70	$71-89	$90-100	$101-110	$111-120	$121-135	$135-
27	12	13	4	7	8	8
34.2%	15.2%	16.5%	5%	8.9%	10.1%	10.1%
				Total	100%	

79 Available Rental 2-24-69
1 Rental without price

80 Total

$90.00 Approximate average rent of the 79 available Rentals

SINGLE ROOM RENTALS

GRANT HOTEL - 1012 Quarrier Street

Average weekly rate - $15.00
Average Monthly rate - 60.00
Nightly rate - 3.50 with connecting bath
Nightly rate - 5.00 private bath

Average available rooms 12
Available rooms today 12
Average size of rooms are 150-255feet

DUPONT HOTEL - 170 Summers Street

Average weekly rate $9.00 - $13.00
Average monthly rate $35.00 - $45.00
Nightly rate - 2.00 - $5.00

Average available rooms 15
Available rooms today 15
Total Rooms in Hotel 51 Approximately 10 rooms for transit trade
Average size of rooms - 150 square feet to 265 square feet
Types of rooms - Inside no running water 14 rooms
Hot & Cold Running water 33 rooms
Connecting Shower 4 rooms

51 rooms-total

REYNOLD'S HOTEL - 301 Court Street

Average weekly rate $8.00 - $13.00
Average monthly rate $34.00 - $45.00
Nightly rate

Average available rooms 8
Available rooms today 7
Average size of rooms 150 sq. ft. - 200 sq. ft.
Types of rooms - Rooms with connecting baths - 6
Rooms with running water - 6
Rooms with no water - 1
Rooms with private bath - 2

WORTHY HOTEL - 1018 Quarrier Street

Average weekly rate $14.00
Average monthly rate $45.00
Nightly rate
Average available rooms 20
Available rooms today 20
Average size of rooms 150 sq. ft - 275 sq. ft.

LEE HOTEL - Lee and Court Street

Average weekly rate	$10.50	
Average monthly rate	$40.00	
Nightly rate		
Average available rooms		5
Available rooms today		5
Average size of rooms		150 sq. ft. - 225 sq. ft.

Lucas Tourists Hotel Summers Street

Average weekly rate	$12.00	
Average monthly rate	$45.00	
Average available rooms		20
Available rooms today		21
Average size of rooms		150 sq. ft. - 280 sq. ft.

Types of rooms - All rooms have running water
- Two rest rooms on each floor with showers

HOLLEY HOTEL - 1008 Quarrier Street

Types of rooms: (1) Running water 90 rooms
(2) Small room with shower 75 rooms
(3) Double bed with shower 44 rooms
(4) Air conditioned twin bed or double beds with combination bath and shower 74 rooms

Type of Room	Nightly	weekly	Monthly
1	$3.50	$20.00	$60.00
2	$4.00	$24.00	$75.00
3	$5.00	$30.00	$80.00
4	$6.00 - $7.00	$35.00 - $45.00	$120.00 - $130.00

Average rooms available	110
Rooms available today	109

RUFFNER HOTEL Kanawha Boulevard

Average weekly rate	$16.00 with bath
Average monthly rate	$64.00 with bath
Average weekly rate	$20.00 with bath and shower
Average month rate	$80.00 with bath and shower
Average weekly rate	$24.00 with bath and TV
Average monthly rate	$96.00 with bath and TV

Elevator - 24 hour switchboard - maid service

Average rooms available	~~154~~
Average rooms today	~~154~~ 60

TOTAL AVERAGE AVAILABLE ROOMS - ~~344~~

THESE SALES ARE PRIVATE LISTINGS OF INDIVIDUALS OBTAINED FROM NEWSPAPERS, AND JUST CANVASING THE CHARLESTON METROPOLITAN AREA.

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT Charleston Area DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	8	1	0	0	0	9
5,001-7,000	1	13	7	0	0	0	21
7,001-9,000	0	19	10	1	0	0	30
9,001-11,000	1	17	13	2	0	0	33
11,001-13,000	0	11	10	1	0	0	22
13,001-15,000	0	9	9	0	0	1	19
15,001-17,000	0	6	5	2	0	0	13
17,001-19,000	0	1	7	1	0	0	9
19,001-21,000	1	1	5	1	0	0	8
21,001-23,000	0	1	0	2	0	0	3
23,001-25,000	0	1	1	1	0	0	3
25,000-OVER	0	2	1	1	0	1	5
TOTALS	3	89	69	12	0	2	175

Above Total Complimented by:
Approximately 450 M.L.S.
Another 175 which are handled by small Real Estate and private listings.

GRAND TOTAL 175

THE FOLLOWING AVAILABLE SALES ARE MULTIPLE LISTING SERVICE LISTINGS WHICH HAVE BEEN DIVIDED INTO DIFFERENT AREAS OF THE CITY AND SURROUNDING AREAS.

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT CHAS WEST LEVEL DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	0	0	0	0	0	0
7,001-9,000	0	0	1	0	0	0	1
9,001-11,000	0	2	3	0	0	0	5
11,001-13,000	0	3	4	0	0	0	7
13,001-15,000	0	4	0	2	0	1	7
15,001-17,000	0	0	4	0	0	0	4
17,001-19,000	0	0	0	1	0	0	1
19,001-21,000	0	0	1	0	0	0	1
21,001-23,000	0	0	1	1	0	0	2
23,001-25,000	0	0	0	0	0	0	0
25,000-OVER	0	0	0	0	0	0	0
TOTALS	0	9	14	4	0	1	28

GRAND TOTAL 28

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT Chas. West Hill DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000							0
5,001-7,000							0
7,001-9,000							0
9,001-11,000		4	1	2	1		8
11,001-13,000	1	3	1	2	0	0	7
13,001-15,000		4	1				5
15,001-17,000		1	0	1			2
17,001-19,000			3				3
19,001-21,000		1					1
21,001-23,000			2		1	1	4
23,001-25,000			5	1			6
25,000-OVER			5	5	1	1	12
TOTALS	1	13	18	11	3	2	48

GRAND TOTAL 48

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT CHAS. EAST LEVEL DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	0	0	0	0	0	0
7,001-9,000	0	0	0	0	0	0	0
9,001-11,000	0	0	0	0	0	0	0
11,001-13,000	0	0	1	0	0	0	1
13,001-15,000	0	0	0	0	1	0	1
15,001-17,000	0	0	1	0	1	0	2
17,001-19,000	0	0	0	1	0	0	1
19,001-21,000	0	0	0	1	0	0	1
21,001-23,000	0	1	1	1	0	0	3
23,001-25,000	0	0	1	0	0	0	1
25,000-OVER	0	1	0	3	2	0	6
TOTALS	0	2	4	7	3	0	16

GRAND TOTAL 16

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT CHARLESTON EAST H. DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000							0
5,001-7,000							0
7,001-9,000							0
9,001-11,000							0
11,001-13,000			1				1
13,001-15,000		1					1
15,001-17,000							0
17,001-19,000		1					1
19,001-21,000			2				2
21,001-23,000			1				1
23,001-25,000			2				2
25,000-OVER			1	1			3
TOTALS	0	2	7	1	0	1	11

GRAND TOTAL 11

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT CHAS. KNAWIA CITMATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	0	0	0	0	0	0
7,001-9,000	0	0	0	0	0	0	0
9,001-11,000	0	1	0	0	0	0	1
11,001-13,000	0	0	0	0	0	0	0
13,001-15,000	0	0	1	1	0	0	2
15,001-17,000	0	1	2	0	0	0	3
17,001-19,000	0	0	1	0	0	0	1
19,001-21,000	0	0	1	0	0	1	2
21,001-23,000	0	1	1	0	0	0	2
23,001-25,000	0	0	3	0	0	0	3
25,000-OVER	0	0	13	5	3	0	21
TOTALS	0	3	22	6	3	1	35

GRAND TOTAL 35

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT CHAS. SOUTH HILLS DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	1	0	0	0	0	1
7,001-9,000	0	0	0	0	0	0	0
9,001-11,000	0	2	0	0	0	0	2
11,001-13,000	0	0	1	0	0	0	1
13,001-15,000	0	2	6	0	0	0	8
15,001-17,000	0	0	0	0	0	0	0
17,001-19,000	0	0	3	1	0	0	4
19,001-21,000	0	0	2	1	0	0	3
21,001-23,000	0	1	4	1	0	0	6
23,001-25,000	0	1	4	2	0	0	7
25,000-OVER	0	4	36	15	1	1	57
TOTALS	0	11	56	20	1	1	89

GRAND TOTAL 89

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT SOUTH CHARLESTON DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	0	0	0	0	0	0
7,001-9,000	0	0	0	0	0	0	0
9,001-11,000	0	2	1	2	0	0	5
11,001-13,000	0	5	0	0	0	0	5
13,001-15,000	0	4	3	0	0	0	7
15,001-17,000	0	1	10	0	0	0	11
17,001-19,000	0	1	11	2	0	0	14
19,001-21,000	0	2	8	3	0	0	13
21,001-23,000	0	0	5	2	0	0	7
23,001-25,000	0	0	4	0	1	0	5
25,000-OVER	0	0	15	10	1	0	26
TOTALS	0	15	57	19	2	0	93

GRAND TOTAL 93

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT DUNBAR DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	0	0	0	0	0	0
7,001-9,000	1	0	0	1	0	0	2
9,001-11,000	0	3	2	1	0	0	6
11,001-13,000	0	2	4	1	0	0	7
13,001-15,000	0	3	4	1	0	0	8
15,001-17,000	0	3	1	4	0	0	8
17,001-19,000	0	0	4	1	0	0	5
19,001-21,000	0	0	5	0	0	0	5
21,001-23,000	0	0	2	0	0	0	2
23,001-25,000	0	0	0	0	0	0	0
25,000-OVER	0	0	0	2	0	1	3
TOTALS	1	11	22	11	0	1	46

GRAND TOTAL 46

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT TYLER MOUNTAIN DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	0	0	0	0	0	0
7,001-9,000	0	0	0	0	0	0	0
9,001-11,000	0	0	0	0	0	0	0
11,001-13,000	0	1	1	0	0	0	2
13,001-15,000	0	3	4	1	0	0	8
15,001-17,000	0	1	6	0	0	0	7
17,001-19,000	0	1	3	0	0	0	4
19,001-21,000	0	0	3	0	0	0	3
21,001-23,000	0	0	4	0	0	0	4
23,001-25,000	0	0	2	0	0	0	2
25,000-OVER	0	0	12	5	0	0	17
TOTALS	0	6	35	6	0	0	47

GRAND TOTAL 47

INVENTORY OF AVAILABLE DWELLINGS FOR SALE

PROJECT ELK DATE 2-28-69

PRICE RANGE	NUMBER OF BEDROOMS						TOTALS
	1	2	3	4	5	6	
0-5,000	0	0	0	0	0	0	0
5,001-7,000	0	1	0	0	0	0	1
7,001-9,000	0	1	0	0	0	0	1
9,001-11,000	0	1	1	0	0	0	2
11,001-13,000	0	2	1	0	0	0	3
13,001-15,000	0	6	3	2	0	0	9
15,001-17,000	0	1	1	0	0	0	2
17,001-19,000	0	3	3	1	1	0	8
19,001-21,000	0	2	1	0	0	0	3
21,001-23,000	0	3	1	0	0	0	4
23,001-25,000	0	0	5	0	0	0	5
25,000-OVER	0	0	7	4	1	0	12
TOTALS	0	18	23	7	2	0	50

GRAND TOTAL 50

Transcript of Testimony

(Title Omitted in Printing.)

Tried to the Honorable John A. Field, Jr., United States District Judge, on the 2d day of April, 1969.

Appearances:

MESSRS. MICHAEL DAVIDSON, JOHN BOETTNER, A. ANDREW MACQUEEN, DONALD SAXTON and THOMAS LYTTON, counsel for plaintiffs

PREISER, GREENE & HUNT (Messrs. Stanley E. Preiser and L. Alvin Hunt), counsel for William S. Ritchie, O. R. Colan, M. R. Hamill, Jack Samples, Don Rude and Joseph S. Jones

MESSRS. CLEO JONES and BERNARD DUFFY HORAN, counsel for Elmer Dodson, Mayor of the City of Charleston, City of Charleston, and City Council of the City of Charleston

MR. W. WARREN UPTON, Assistant United States Attorney, counsel for John Volpe, Secretary of Transportation, Francis C. Turner, Administrator of Federal Highway Administration and the Acting Director of the Bureau of Public Roads.

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[3] MORNING SESSION

April 2, 1969

* * * * *

[8] * * *

The Court: Along that line, Mr. Davidson, I might ask you this question. From time to time during the course of this litigation I have asked these gentlemen to advise me whether the thrust of their complaint is to the effect that the routing of the interstate through the area in question was done with you might say a primary discriminatory

purpose. They have disavowed that position. I assume you are aware of that.

Mr. Davidson: Yes, sir, I am.

The Court: They so far have taken the position in this Court that they do not challenge the project or the implementation of it on that ground, that they merely are taking the position that the practical effect of it does have an impact upon something like—I think it is 200 families who are in the projected corridor.

Mr. Davidson: The plaintiffs' position now, I might address myself to some questions and pleadings at this time. [9] Plaintiffs now agree to the limitation of the issues to the questions of the compliance by federal and state authorities with the relocation provisions of the Federal Aid to Highway Act and any constitutional questions which arise out of the displacement of persons by the proposed highway, and pursuant to that limitation we will not present or offer any evidence in connection with allegations concerning the public hearings held in 1964.

We do this in the interest of going to the heart of the immediate problem, not because we do not still have doubts concerning the public hearings. We have grave doubts concerning them, but we believe to move the litigation expeditiously we should go to the question of the applicability of the relocation provision of the 1968 Act and compliance thereto.

The Court: All right, sir.

Mr. Davidson: In respect to the pleadings I would also ask, your Honor, for our permission to move again to amend the pleadings to show that plaintiffs seek review under the Administrative Procedure Act. I think an inspection of the complaint, particularly paragraph 25, shows that in all essential aspects plaintiffs have pleaded an action under the Administrative Procedure Act. They have pleaded

federal defendants have acted arbitrarily and capriciously, and that is in essence an action under the Administrative Procedure Act.

[10] The Court: I will take that under consideration.

Mr. Boettner, I want to address something else to you. In this particular litigation involving this corridor, in your affidavit to proceed in forma pauperis the signatures on the second page on the left hand column are the Triangle Improvement Council by William Preston, President, and six members and individuals: Keith Kincaid, Tennis Hogans, Robert Bayes, Katie Dean, Sedalia Haynes and Lillian Day. I want to know are all of the individuals who signed that affidavit indigents within the accepted definition of the law?

Mr. Boettner: Your Honor, according to the OEO guidelines.

The Court: Not according to the OEO guidelines. What I want to know is those people who signed this affidavit own no property, I take it, have no financial resources to finance litigation, and I am asking you as an officer of this Court to advise me as to that.

Mr. Boettner: Your Honor, we do have I think one or two property owners but we do so also maintain that these people do not have sufficient funds to maintain this litigation, particularly the litigation of this great aspect.

The Court: Who are the property owners?

Mr. Boettner: Your Honor, Keith Kincaid is one and Mr. Robert Bayes.

[11] The Court: You say that they own property but do not have the resources to finance this litigation on their part?

Mr. Boettner: Yes, your Honor. The property owned in the Triangle itself is of such a small value that we take the position even if they took a mortgage on the property they could not maintain this action.

Primarily, your Honor, what we have here is an action brought by the Triangle Improvement Council on behalf of all these people. We merely inserted the named plaintiffs to give the Court an indication specifically of the type of action the TIC itself proposes to represent.

The Court: How many members does TIC have?

Mr. Boettner: Mr. Preston is here. Would you like to call him to the stand?

The Court: I don't want to call him to the stand. Just give me an estimate of how many members they have.

Mr. Boettner: I would say probably twenty to thirty. They have four or five officers, strictly officers, president, vice-president, secretary and treasurer, and they are comprised of 200 members.

The Court: And you have no idea how many of them live within this disputed corridor about which we are concerned here?

[12] Mr. Boettner: I would say the majority of them, your Honor; between 75 to 100 live within the Triangle itself.

The Court: I know the Triangle itself, but I mean the corridor with which we are concerned here, the interstate corridor.

Mr. Boettner: I can't give you any specific number. We would estimate between thirty and fifty within the exact corridor as it is presently defined now.

The Court: What are the desires of the other people out there who live in this corridor? Do you have any idea?

Mr. Boettner: Their desires?

The Court: Yes, their attitude toward this thing. Are they espousing the same thing?

Mr. Boettner: Yes, your Honor. This is one solid unified position. There is complete unanimity in their opposition to failure to comply with the relocation.

The Court: You have no one out there who dissents from the position that's been taken here?

Mr. Boettner: To the best of my knowledge, your Honor, no.

The Court: All right, gentlemen; anything further before we get started?

Mr. Boettner, call your first witness.

Mr. Davidson: The plaintiffs wish to call Mr. Colan [13] to the stand.

Mr. Preiser: If your Honor please, we have complied with the Court's suggestion in your letter of March 26 and Mr. Colan has brought with him maps and the answers to those questions. Would it help counsel—I am asking through the Court—for the plaintiff to give him these in advance or develop them with Mr. Colan?

The Court: It might be helpful to him to give them to him in advance. Swear the witness.

The Clerk: What is your name, please?

The Witness: O. R. Colan.

O. R. Colan called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Davidson:

Q. Please state your name for the record. A. O. R. Colan.

Q. Are you presently employed by the West Virginia State Road Commission? A. Yes.

Q. In what capacity are you employed? A. Director of the Right of Way Division.

Q. What are your responsibilities as Director of the [14] Right of Way Division? A. As Director of the Right of Way Division they are primarily the appraisal and acquisi-

tion of land for the highways in West Virginia, property management, utility relocation, relocation of personnel, people displaced from the highway projects, all related activities to right of way acquisition.

Q. How long have you held this position? A. Since about October 1962.

Mr. Davidson: May we have this marked as Plaintiffs' Exhibit Number 1 for identification?

The Court: Yes. We will mark it Plaintiffs' Exhibit 1. Go ahead.

Plaintiffs' Exhibit Number 1 for Identification

The map referred to was marked as indicated above.

Q. Mr. Colan, please examine and identify Plaintiffs' Exhibit Number 1 for identification. A. The exhibit is a map showing with red lines the location of the Interstate Project I-77-3-(66)100 and I-77-3(67)98 through the area which is commonly known as the Triangle.

Q. Referring to the project numbers on the bottom of Plaintiffs' Exhibit Number 1, would you please describe the significance of those numbers? What do they say? A. The project numbers at the bottom of the map [15] indicate that there are two separate projects which meet at Court Street in the Triangle.

Q. Mr. Colan, are you familiar with the provisions of the Federal Aid to Highway Act? A. Generally.

Q. Has the State Road Commission submitted to the Department of Transportation plans, specifications and estimates in connection with Project Number I-77-3(66)100?

Mr. Preiser: If your Honor please, for the record and for the Court, it has been the position of the State Road Commission and Mr. Colan and Mr. Ritchie and eventually Mr. Hamill that the statutory

provisions and regulations pursuant thereto are not applicable to this project.

However, we have complied with them anyway. If counsel's question is to determine whether they are applicable, these are matters of law we would like to discuss with the Court. If he wants to find out if we complied with them in any event, we did.

The Court: In the interest of expedition of this matter, go ahead and question him. We will get to that. You are referring to the '68 Act?

Mr. Preiser: Yes, your Honor.

The Court: Go ahead.

Q. Please answer the question, Mr. Colan. [16] A. Plans, specifications and estimates for the construction of that project have not been to my knowledge submitted to the Bureau of Public Roads. The final plans, specifications and estimates.

Q. To be clear, Mr. Colan, are you familiar with the provisions of Section 106 of Title 23?

The Court: You had better read it to him. Don't expect a man to remember them all by number.

Q. Mr. Colan, let me show you—

The Court: You don't have to show it to him. Read it to him.

Q. Section 106 of Title 23, which is the Federal Aid to Highway Act, is entitled "Plans, specifications, and estimates". Paragraph (a) which I will read states: "Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed

project included in an approved program as the Secretary may require.

"The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution [17] thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title."

My question, Mr. Colan, is has the State Road Commission submitted surveys, plans, specifications and estimates pursuant to this section of the Federal Aid to Highway Act?

Mr. Preiser: Your Honor, I want to interpose another objection. I thought this goes beyond the area the question was making inquiry concerning these displacees. The portion of the Act he is talking about now as I see it has nothing to do with that.

Mr. Davidson: Your Honor, if I may be permitted to respond to the objection—

The Court: Go ahead.

Mr. Davidson: Referring, your Honor, to Section 502 of Title 5—

The Court: You are reading from what, Mr. Davidson? Title 5, what?

Mr. Davidson: Section 502; it is Title 5.

The Court: Title 23, section what?

Mr. Davidson: 502 refers to Title 5 of the Federal Aid to Highway Act.

The Court: That's in the Act?

Mr. Davidson: Yes.

[18] The Court: But not the Code?

Mr. Davidson: It is Chapter 5.

Mr. Upton: Your Honor, it is in the pocket part of the volume.

The Court: 502 did you say?

Mr. Davidson: Yes.

The Court: All right. Go ahead.

Mr. Davidson: The relevancy of questions relating to Section 106 is that Section 502 of Title 23 says, "The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation"—

The Court: Just a minute. Aren't you getting into the very area now about which Mr. Preiser raised an objection? Aren't you getting this man into a posture where you are trying to ask him questions of law, Mr. Davidson?

Mr. Davidson: No, your Honor, I am not. I am merely asking what the status of action under Section 106 is as the status of action under 106 is relevant to the applicability of Section 502.

The Court: All right. Go ahead.

Q. Will you please answer the question, Mr. Colan?

The Court: I expect you had better restate it. He has probably forgotten it.

[19] Q. The question is whether the State Road Commission has submitted plans, specifications and estimates for Project I-77-3(66)100 as set forth in Section 106 of Title 23, which section I read to you previously. A. If you are referring to construction plans, construction esti-

mates and construction specifications, to the best of my knowledge the answer is no. If you are referring to the right of way plans, right of way estimates and right of way specifications, the answer is yes.

Q. Do regulations of the Department of Transportation or of the State Road Commission distinguish plans and specifications for the two activities which you describe? A. Yes. There are entirely different plans for construction. There are specific regulations on how right of way plans shall be submitted, what time and what sequence, what specifications shall be submitted for authorization for each of the many phases of the project.

Q. In what form are these regulations? A. The form is generally in policy and procedure memorandums of the Bureau of Public Roads and the Department of Transportation or instructional memorandums or circular memorandums, all of which are issued by the Department of Transportation, Federal Highway Administration, Bureau of [20] Public Roads.

Q. Do you have available with you memorandums issued pursuant to Section 106 of Title 23? A. In our library we have complete sets of the volumes of the regulations.

Q. Is this included amongst the list of documents brought to court?

> Mr. Preiser: I don't think that's within what the Court suggested we supply and I don't think it was ever requested.

Q. Mr. Colan, I would now like to ask the same question concerning submission of plans, specifications and estimates but now for the project designated I-77-3(67)98. Have plans, specifications and estimates been submitted

for that project? A. The Right of Way Division plan has been submitted and authorized by the Bureau of Public Roads. The actual construction plans, specifications and estimates to the best of my knowledge have not been submitted to the Bureau of Public Roads.

Mr. Davidson: Please mark for identification as Plaintiffs' Exhibit Number 2 this instructional memorandum.

The Clerk: Plaintiffs' Number 2 marked for identification.

[21]

Plaintiffs' Exhibit Number 2 for Identification

The memorandum referred to was marked as indicated above.

Mr. Davidson: Your Honor, while it is being marked may I offer Exhibit Number 1 in evidence?

The Court: It will be admitted.

Plaintiffs' Exhibit Number 1

The map referred to, previously marked for identification, was admitted in evidence.

Q. Mr. Colan, I show you an exhibit marked Plaintiffs' Exhibit 2 for identification and ask you to examine and identify the exhibit. A. The exhibit is an instructional memorandum of the Department of Transportation, Federal Highway Administration, Bureau of Public Roads Number 80-1-68 issued September 5th, 1968. It apparently is the original memorandum without any of the amendments or clarifications that have been issued since.

Q. Mr. Colan, have amendments and clarifications been issued? A. Yes.

Q. How many? A. I could only estimate.

Q. Do you have such amendments with you today? [22] A. I'm not certain that I have all of them.

Mr. Preiser: I think we can submit to you, if you like, Mr. Davidson, a full set. (Handing papers to counsel for plaintiffs)

Mr. Davidson: Please mark as Plaintiffs' Exhibit Number 3 for identification this folder of procedures and memoranda.

The Clerk: Plaintiffs' Exhibit Number 3 marked for identification.

Plaintiffs' Exhibit Number 3 for Identification

The folder referred to was marked as indicated above.

Mr. Preiser: Your Honor, I hate to interrupt, but in order to proceed more orderly, my understanding is that there are presently no outstanding subpoenas duces tecum that have been served upon Mr. Colan. He keeps asking him has he brought certain documents. If he will ask us, we will try to give him anything he wants. Mr. Colan has brought nothing because he was not subpoenaed.

The Court: If there are documents available, it would be all right to get them out of the way.

Q. Mr. Colan, I show you Plaintiffs' Exhibit Number 3 for identification and ask you to examine and identify the exhibit. [23] A. It contains a group of circular memo-

randums issued by the Department of Transportation, some just plain memorandums concerning relocation advisory assistance and the provisions of IM 80-1-68.

Q. Does Plaintiffs' Exhibit Number 3 for identification include all the regulations issued by the Department of Transportation concerning relocation? A. I believe it includes all the ones, from quickly looking at it. I think it covers all of them.

Mr. Davidson: Your Honor, I would like to offer Plaintiffs' Exhibits 2 and 3—

A. It covers all that I know of.

Mr. Davidson: —in evidence.

The Court: All right.

Mr. Upton: Your Honor, I would object until I have had an opportunity to see 2. I haven't seen 2 yet. I'm not sure I understand.

The Court: Would you enlighten Mr. Upton?

Mr. Upton: I would appreciate it.

Mr. Davidson: Plaintiffs' Exhibit 2 is regulations issued by your clients concerning relocation services under Chapter 5 of Title 23.

Mr. Upton: This is included in Number 3. If you want to put it in separately, that's all right.

[24] Mr. Davidson: I would at this time for ease of handling and then perhaps withdraw it.

The Court: That's all right. We will let both of them in.

Plaintiffs' Exhibits 2 and 3

The exhibits referred to, previously marked for identification, were admitted in evidence.

Q. Mr. Colan, are these the regulations under which you carry out your administration of the relocation program in Charleston? A. On federal aid projects, yes; to the extent that they are applicable.

Q. Referring to page 2 of Plaintiffs' Exhibit Number 2 in evidence, paragraph 4 subparagraph (b), I would like to ask you whether the State Road Commission has amended any project agreements executed on or before August 23, 1968. A. Yes.

Q. Has it amended any project agreements concerning Project I-77-3(66)100? A. Yes.

Q. Do you have available in the courtroom that amended project agreement? A. I don't believe so.

Q. Is that available in your files? [25] A. Yes.

Q. Could it be brought to the court later without any difficulty? A. It can be brought.

Q. Has a similar amendment been entered into in respect to the second project? A. Yes. To the best of my knowledge amendments were entered into to provide in the agreement for these additional costs of supplemental payments to tenants, property owners, under the provisions of this IM.

Q. Referring now to page 3 of Plaintiffs' Exhibit Number 2, paragraph 5 subparagraph (c), has the West Virginia State Road Commission submitted any statement pursuant to that subsection?

Mr. Davidson: Your Honor, if you would like a copy of this—(Handing paper to the Court)

The Court: All right. Thank you.

A. Yes.

Q. What do those assurances state? A. They stated the extent to which the State Road Commission was able to comply under this statute.

Q. Did the State Road Commission indicate that it was unable in any way to comply with the provisions of these regulations? [26] A. There initially was a funding problem based on varying interpretations of the memorandum. Once the funding question was resolved, a procedural matter, our statement was that we were able to comply. There were certain conditions in it which were worked out between the federal government and the state to provide for compliance, the conditions pertaining to handling of funds.

Q. Did any of the conditions relate to the assurance of an adequate supply of relocation housing? A. Yes, to the extent it was required under this instructional memorandum and the amendments.

Q. As you have testified, you have now submitted a memorandum stating that there are no further impediments to compliance. A. I believe that would be a correct terse summary of it.

The Court: What was the question?

Mr. Davidson: The question is whether it is the position of the State Road Commission that it is legally able or unable to comply, whether they have notified—

Mr. Preiser: That wasn't the question he asked him, your Honor.

The Court: Read the question.

(The last question and answer were read.)

[27] Q. Has the State Road Commission submitted a plan of relocation to the Department of Transportation? A. Several.

Q. Do you have them available with you in the court today? A. No, sir.

Q. Are they available in your files? A. They are available in individual project files in which they have been submitted.

Q. Were they submitted in connection with Project I-77-3(66)100? A. No, sir.

Q. Has a plan of relocation been submitted for Project I-77-3(67)98? A. No, sir. No plans were submitted on either of these since they were authorized and the right of way was substantially acquired on the entire project prior to this memorandum, and in accordance with our understanding of the federal instructions and their written agreements with us that it would not apply, that you do not have to go back on any phase of the project and do actions that were required prior to the present stage, but plans have been submitted on other projects which were not authorized at the time of the effective date of this law.

[28] Q. Mr. Colan, for ease of designation I would like to refer to Project I-77-3(66)100 as Project A and Project I-77-3(67)98 as Project B. It is a rather long set of numbers. Referring to Project A, has the State Road Commission acquired all the properties shown within the right of way on Plaintiffs' Exhibit Number 1?

The Court: You say "has"?

Mr. Davidson: Yes.

The Court: As of this date?

Mr. Davidson: Yes.

A. The ones colored in green on this exhibit show the properties that have been acquired, optioned or condemned as of this date for the small segment of this project that's shown on that map. The total length of the project is over two miles. Several hundred other properties have been acquired that aren't shown on this map on the other side of the river.

The Court: On the other side of the river?

The Witness: Yes, sir; on the other side of Elk River.

Q. As of August 23, 1968, how many properties had the State Road Commission acquired in Project A? A. I can't give you an exact number without referring to my notes.

Q. You may refer to your notes.

[29] The Court: Do you have it, Mr. Colan?

The Witness: I believe I have it in my briefcase back there.

The Court: Do you have it available?

* * * * *

The Court: Did you get it?

The Witness: No, sir, I'm sorry; I do not have a [30] copy of it.

The Court: He does not have a copy, Mr. Davidson.

Mr. Preiser: Do these maps help you? Could you do it from those maps?

The Witness: No, sir, I cannot.

The Court: Let's move along, gentlemen.

The Witness: Most of the properties shown on there were acquired before December of 1968. There were a very few after that date.

Q. The date is December 1968? A. Wasn't that the date you asked about?

Q. My question referred to August 23, 1968. Are you able to testify without your notes as to when properties were acquired in relation to that date? A. I really can't.

Q. Are these documents from which you might be able to testify in your files? A. Yes, sir.

Q. Could they be made available on short notice? A. Yes.

Q. What is the definition you apply to the word "acquisition", Mr. Colan? A. The process of acquiring title, either legal or equitable, to the real property, since we deal only in real [31] property.

Q. Are the properties marked in green on Project A of Plaintiffs' Exhibit Number 1 properties in which title now has passed to the State Road Commission? A. They are properties which have been—I believe all the options have been accepted, many of them have been closed, the money paid to them, and I believe there is one condemnation case among those properties. It is now pending. I'm not certain of the exact status of it as to whether title has passed and we have a right of entry. I just cannot tell.

Q. Is that property shown in green on this map? A. Yes.

Q. So that the designations in green do not necessarily show properties for which title has passed to the State Road Commission. A. I believe all the titles in there except the condemnation proceeding have been either

passed by a deed or an option has been entered into and we have accepted the option.

Q. How many persons who had been in Project A were displaced prior to August 23, 1968? A. I do not have that figure available.

Q. Were any displaced by actions of the State Road Commission? [32] A. Some persons relocated prior to that date to the best of my knowledge, yes.

Mr. Preiser: Mr. Davidson, I believe I found the document you need. See if that's the one he wants. Show that to him and I think he can answer your question as to which parcels were acquired.

Mr. Davidson: I think we ought to mark this for identification.

Mr. Preiser: I didn't give that to him to introduce in evidence, your Honor.

The Court: Just hand it to the Clerk, Mr. Davidson. I would suggest you inquire of the witness. It is unintelligible unless you would have him refer to the legend and testify about it.

Mr. Davidson: I wish it to be identified so that I might examine him on that basis.

The Court: Go ahead and examine him. Ask him about it.

Q. Please describe these two sheets of paper. A. It contains a list of the project parcels on the two projects that affect the Triangle area showing the dates that we optioned the properties or the date that a condemnation proceeding was entered, in the one case that the condemnation was entered.

[33] Q. Does this document show that options were entered into after August 23, 1968? A. Yes, sir.

Q. Does it show that condemnation proceedings were commenced after August 23, 1968? A. One condemnation proceeding, yes, sir.

Q. Does it show whether properties for which options have been signed have actually passed in the way of title to the State Road Commission? A. No, sir.

Q. Do you know from your own knowledge which of these parcels have now passed to the State Road Commission? A. I do not know of my own knowledge which of these the actual deed has been signed.

Q. Do you have records that show that? A. Yes, sir.

Mr. Davidson: I would now like to have this identified and then offered.

The Court: All right. Do you have any objection, gentlemen?

Mr. Preiser: Your Honor, as long as we can get a copy back. It is our only copy.

The Court: You may have it copied.

The Clerk: Plaintiffs' Exhibit Number 4 marked for [34] identification.

Plaintiffs' Exhibit Number 4
for Identification

The papers referred to were marked as indicated above.

Mr. Upton: May we see that, please, your Honor?

(Plaintiffs' Exhibit Number 4 was handed to Mr. Upton:)

The Court: All right, Mr. Davidson, let's move along.

Q. Is Plaintiffs' Exhibit Number 4 the document which you have just described, showing options and condemnation proceedings? A. Yes.

Mr. Davidson: I offer that in evidence, your Honor.

The Court: You say what?

Mr. Davidson: I offer that in evidence.

The Court: All right.

The Clerk: Plaintiffs' Exhibit Number 4 admitted in evidence.

Plaintiffs' Exhibit Number 4

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Mr. Colan, referring to Project B on Plaintiffs' Exhibit Number 1, how many of the properties within Project B [35] were acquired by the State Road Commission on or before August 23, 1968? A. In the total project I would say, oh, maybe 200 I am just estimating.

Q. Now, limiting your testimony to the area shown on the map, how many properties were acquired prior to August 23, 1968? A. In the segment of the—small segment of the project shown on the map—I need that exhibit again.

(Plaintiffs' Exhibit Number 4 was handed to the witness.)

A. All the properties were acquired prior to that date that are shown in green on that exhibit.

Q. Mr. Colan, were they acquired or were options signed? A. Options were signed prior to that date.

Q. Has title passed on any of those properties to the State Road Commission? A. To the best of my recollection, yes, sir.

Q. On which of those properties, Mr. Colan?

Mr. Preiser: We object to that, your Honor. It's a legal proposition. We would take the position equitable acquisition passes as soon as the option is signed.

The Court: I was under that impression myself, but [36] go ahead.

Q. Were any persons displaced by the State Road Commission in Project B prior to August 23, 1968? A. To the best of my recollection some people did relocate prior to that date, sir; yes.

Q. Were those people in properties that had been optioned to the state? A. Yes. That's the best of my recollection.

Q. Do you have documents which would show that? A. We keep documents on each relocation, yes.

Q. Are those documents in your possession in your office? A. Yes.

Q. Mr. Colan, are you able to tell or do you know how many families live in the area which we have designated as Project B on Plaintiffs' Exhibit Number 1? A. No, sir; I have the total for the whole area shown on the map.

Q. What is the total for the entire area? A. The number of families that remain?

Q. Yes. A. Fifty-nine.

Q. What is the total number of households? A. Fifty-nine families and I believe 116, to the best [37] of my recollection, individuals.

Q. That's a total of over 170 households, isn't it? A. Yes.

Q. So that the number of households, Mr. Colan—

The Court: What do you mean "household"?

Mr. Davidson: Household is the term describing families or individuals living together, total units of individuals.

The Court: How many families, did you say?

The Witness: Fifty-nine families.

The Court: And then you said—

The Witness: 116 individuals who are roomers, persons living in a hotel room, living in a rooming house, sometimes an individual who occupies—

The Court: You had fifty-nine family entities and 116 persons who had lodging in a private room or something of that nature?

Mr. Davidson: Federal officials use that term in describing households.

The Court: Anybody who has a room in a hotel, that is a household?

Mr. Davidson: Yes, or where an individual is living as an individual alone in his own house.

The Court: I can understand that, but let's say [38] you have one house and you have a family of four living in it. That's a family unit.

Mr. Davidson: Yes.

The Court: And that's a household.

Mr. Davidson: That's right.

The Court: And if they have three roomers, is that three more households?

Mr. Davidson: Yes, that would be.

The Court: All right.

Q. Of the number of 175, how many households were displaced prior to August 23, 1968?

Mr. Preiser: Again, your Honor, unless this witness is going to accept his definition of household, we ought to know what he is talking about.

The Court: I was going to say his definition of household makes to me as much sense as a lot of other things in this case. Ask him about the individuals. That's what we are concerned with, the human beings out there. If he knows.

Q. What is the total number of persons, Mr. Colan, living in the area shown on Plaintiffs' Exhibit Number 1? A. Total number of persons to the best of my recollection are 284, I believe.

Q. Do you have records which show that, Mr. Colan? A. Yes.

[39] Q. Was that the number of persons residing on August 23, or approximately the number of persons residing on August 23? A. It is the number of persons residing there as of now.

Q. Do you know how many persons resided in that area, approximately, on August 23, 1968? A. I do not know exactly on that date, no, sir.

Q. Do you know how many persons the State Road Commission displaced after August 23, 1968 in the area shown on Plaintiffs' Exhibit Number 1? A. I do not have any recollection of the figure.

Q. Were any persons displaced? A. After August 23?

Q. Yes. A. Oh, yes, sir. Yes, sir.

Q. Referring to page 2 of Plaintiffs' Exhibit Number 2, paragraph 5 entitled "Assurances of Adequate Relocation

Assistance Program" and referring specifically to subparagraph a and subparagraph to that which is designated (1), has the State Road Commission submitted satisfactory assurances under subsection (1) for Projects A and B? A. We have submitted assurances for all projects in West Virginia and these have been approved by the Bureau of [40] Public Roads to us.

The Court: Do I understand the import of your answer, Mr. Colan—and you are referring to this memorandum IM 80-1-68. Is that correct, Mr. Davidson?

Mr. Davidson: Yes.

The Court: The import of your answer is that you have or the State Road Commission has submitted the assurances delineated in Section 5 beginning on page 2 and going over to page 3 and that these assurances have been approved by the Bureau of Public Roads?

The Witness: Yes, sir, that's correct.

The Court: Go ahead.

Q. You testified just previously that you had submitted no relocation plan for Projects A and B. A. That's correct.

Q. Did you consider a relocation plan a required assurance under subparagraph (1)?

The Court: Mr. Davidson, we don't approach the witness unless we have some exhibit that we want to refer to.

A. Under subparagraph a. (1)?

Q. Yes. A. No, we did not consider a relocation plan for this project required.

Q. Do you have with you today the assurances which were [41] provided under subparagraph (1)? A. Yes.

Q. Do you have them with you personally or are they in possession of counsel?

The Court: Do they have any bearing on these two projects here?

The Witness: We gave assurances on every federal aid project in West Virginia.

The Court: Including these two that we are referring to as A and B?

The Witness: Yes, sir.

The Court: Go ahead.

Q. Do you have them in your possession personally or are they in possession of counsel? A. I believe they are in the possession of someone in the audience back there in a little blue book.

Mr. Davidson: May I ask counsel to furnish them now, your Honor?

Mr. Preiser: May I hand them to the witness, your Honor?

The Court: Yes. I am just curious. How many individuals in the courtroom are here in response to subpoenas or who are otherwise here whose presence is necessitated by reason of this litigation? I would be interested in seeing [42] how many. (Show of hands)

How many of you are here for either the State of West Virginia or the Federal Government or the

Public Roads? (Show of hands) All right. Thank you.

Mr. Davidson: There are several witnesses who may be excused at this time, given the length of examination.

The Court: You say what?

Mr. Davidson: There are several people subpoenaed who might be released temporarily.

The Court: What do you mean "temporarily"? How long do you think we are going on this thing?

Mr. Davidson: Through tomorrow morning, sir.

The Court: We had better not let them go. We might keep on going here tonight. I was just interested in seeing how disruptive this whole thing was. Go ahead.

The Witness: Yes, sir; I have a xerox copy of those assurances.

Mr. Davidson: Please mark this as Plaintiffs' Exhibit Number 5.

The Court: Are these original papers of yours, Mr. Colan, or are they copies?

The Witness: They are xerox copies.

The Court: Go ahead.

The Clerk: Plaintiffs' Exhibit Number 5 marked for [43] identification.

Plaintiffs' Exhibit Number 5
for Identification

The papers referred to were marked as indicated above.

The Court: Let's move along here.

Q. Mr. Colan, I show you Plaintiffs' Exhibit Number 5 for identification and ask you to examine and identify the

document. A. It is the initial assurances given under IM 80-1-68 paragraph 5 a.—Relocation Assistance and Payments to the Bureau of Public Roads.

Mr. Davidson: I offer this.

The Court: It will be admitted. Put it in. Put it in. Let's move along.

Plaintiffs' Exhibit Number 5

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Are these the sole assurances offered by the State Road Commission in respect to Projects A and B on Plaintiffs' Exhibit Number 1? A. No, sir.

Q. What other assurances were submitted? A. With respect to provision 5 a. of this memorandum [44] a supplemental assurance was submitted November 20th when the federal government revised their procedure to assure that it had to be without regard to race, color, religion or national origin, and assurance was given on that.

Mr. Davidson: May I see that? Please mark for identification as Plaintiffs' Exhibit Number 6, this document.

The Clerk: Plaintiffs' Exhibit Number 6 marked for identification.

Plaintiffs' Exhibit Number 6

The paper referred to was marked as indicated above.

Q. Is Plaintiffs' Exhibit Number 6 for identification the document you have just identified? A. Yes.

O. R. Colan—for Plaintiffs—Direct

Mr. Davidson: I offer this in evidence, your Honor.

The Court: It will be admitted.

The Clerk: Plaintiffs' Exhibit Number 6 admitted in evidence.

Plaintiffs' Exhibit Number 6

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Have any additional assurances beyond Plaintiffs' Exhibits Number 5 and 6 been provided to the Department of Transportation by the State Road Commission? A. We provide a great many assurances required under [45] regulations of the federal government to the Department of Transportation, yes, sir.

Q. I mean to limit that, Mr. Colan, to assurances required by Plaintiffs' Exhibit Number 2, the Department of Transportation's relocation regulations. A. To the best of my recollection there are other assurances required in there and we have provided all the assurances that are required in the memorandum.

Q. Do you have any of the other assurances with you today in your file? A. I would have to search.

Q. Would you please do so, Mr. Colan?

The Court: No, no, no. We aren't going to do that now. The thrust of your examination of this witness is as to whether he complied or the Road Commission complied with the instructional memoranda of the Department of Transportation.

Mr. Davidson: Yes.

The Court: Does it follow then that if they did that you feel that's sufficient under the law?

Mr. Davidson: No, the next step is to actually test those compliances to see if they are compliances in fact.

The Court: But if after the testing of the compliances, if the evidence would indicate that the State Road Commission of West Virginia has complied with all [46] instructional memoranda of the Federal Highway Administration, do you accept that then as dispositive of this thing?

Mr. Davidson: No, I don't, your Honor.

The Court: What else do you want?

Mr. Davidson: The next step is that these are assurances to be provided to the Department of Transportation. The Secretary has an obligation to review these and to make an administrative determination whether they comply with the Federal Aid to Highway Act. After we have elicited all of the assurances provided and examined those, we will then examine the official responsible in the Department of Transportation.

The Court: I see. To see whether he has acted arbitrarily or not?

Mr. Davidson: That is correct.

The Court: Well, then, wouldn't it be better to put the federal witnesses on and go at it that way rather than to start from this end of the thing?

Mr. Davidson: Mr. Colan has at his fingertips, I had hoped, everything that the state has done.

The Court: Yes, but everything that's required, what the state did or did not do from their standpoint would do us no good if your operative step is going to be up at the federal level. Why not call your federal witness, find out what assurances

were given, and from their standpoint whether [47] the State of West Virginia has complied with these. They are the ones that know.

Mr. Davidson: Your Honor, I would be happy to do that if I could recall this witness subsequently.

The Court: All right, but I honestly think what you are trying to do, you are trying to get to the top echelon, so to speak, in this line of responsibility. That is the Bureau of Public Roads or the Federal Highway Administration. They have, or they should have available at their fingertips, to use your phrase, whatever West Virginia has furnished them to indicate whether or not they have complied with the requirements of this memorandum.

After you have done that, then if you want to question them on whether or not they have or have not comported with the constitutional statutory requirements, that's another thing and you can go on from there, but it seems to me to start with this man, regardless of what he says, you are going to go on to the next step and get to the federal authorities.

Mr. Davidson: If I may be able to recall Mr. Colan, I would then follow your Honor's suggestion.

The Court: He will be available, and suppose you go on that way. I think it would be much more expeditious, Mr. Davidson. Do you want to take a brief recess to discuss that?

[48] Mr. Upton: We would appreciate a brief recess, your Honor.

The Court: The Court's wasn't speaking to you, Mr. Upton, but since you responded the Court will take a brief recess.

(Recess taken)

Mr. Davidson: Your Honor, we will release the witness if we may recall him at the conclusion of Mr. Hannon's testimony.

The Court: All right.

(Discussion off the record)

The Court: Your next witness.

Mr. Davidson: Mr. George Hannon.

Mr. Upton: Your Honor, before Mr. Hannon takes the witness stand, a couple of items. First of all, in regard to Mr. Hannon he is not the witness that these parties want, I don't think; but at this time, your Honor, the government would like to request that the Court rule on our motion to dismiss this unless counsel can provide for us at this time what irreparable harm they are attempting to prove and what injury, what is the injury complained of, because we don't know what to defend against, your Honor.

This is taking on now the aspects of a complete review of the administrative procedure under the Administrative [49] Procedure Act, and I understand the Court still has that motion under advisement.

The Court: Somewhere I recall reading that now we see through a glass darkly, but in good time maybe all things will be plain to you, Mr. Upton.

You say you don't think this is the witness Mr. Davidson wants?

Mr. Upton: No, your Honor. Mr. Davidson I think is interested in the federal government witness who is in charge of right of way projects for the federal government.

Colloquy

The Court: Is that witness here?

Mr. Upton: That witness is here and his name is Saunders; Gerald Saunders, not George.

The Court: Would you be willing to take Mr. Upton's suggestion that that is the appropriate witness?

Mr. Davidson: One question to Mr. Upton. The gentleman's name again?

Mr. Upton: Saunders. You subpoenaed him under an improper name.

Mr. Davidson: He is the Division Engineer?

Mr. Upton: That's not correct.

Mr. Davidson: It is the Division Engineer who has the responsibility.

Mr. Upton: The Division Engineer is here too, [50] although he is not under subpoena; Mr. Carpenter.

The Court: You have a choice, Mr. Davidson, through the courtesy of Mr. Upton.

Mr. Davidson: We will take Mr. Saunders.

The Clerk: Please state your name.

The Witness: Gerald B. Saunders.

Mr. Upton: Your Honor, one more thing. I have one more suggestion, if I may. This is an exhibit which I had intended to introduce at the appropriate time, which is an exhibit that shows the limits of these projects that we are talking about, and I would like very much to put it on the blackboard so Mr. Saunders can use it as a frame of reference, with the Court's permission.

The Court: All right.

The Court: Mr. Upton and Mr. Preiser, at your convenience I would like very much for the Court's information for you gentlemen to collate the indi-

viduals who have been called upon to take the time from their duties incident to this litigaton, both in their attendance here today as well as conferences with counsel, et cetera, and insofar as possible determine the man hours that they have been required either on a standby basis or in other ways to devote to this litigation. I merely want a summary of that sometime at the conclusion of this gambit here.

Go ahead.

[51] Mr. Upton: Your Honor, may I tender to the Court a copy of this map?

The Court: The Court is drowning in paper, but that's all right.

All right, Mr. Davidson.

GERALD B. SAUNDERS, called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Davidson:

Q. Please state your name for the record. A. Gerald B. Saunders.

Q. Where are you employed, Mr. Saunders? A. Bureau of Public Roads right here in the Federal Building.

Q. Is that in the Department of Transportation? A. That's correct.

Q. What do you do for the Bureau of Public Roads? A. I am Division Right of Way Officer.

Q. You report to the Division Engineer? A. That's correct.

Q. Do you have any responsibilities in connection with the administration of relocation requirements in the Federal Aid to Highway Act? [52] A. Yes, I do.

Q. And you are the chief officer in charge of that admin-

istration? A. To the extent that I inform my Division Engineer. He is in ultimate charge of all functions.

Q. Has the West Virginia State Road Commission submitted assurances to the Department of Transportation pursuant to the regulations contained in Plaintiffs' Exhibit Number 2, which I will show you?

The Court: You are referring to assurances under paragraph 5?

Mr. Davidson: Yes, your Honor.

A. Paragraph 5? Yes, sir, they have.

Q. Do you have them with you today? A. Yes, sir.

Q. May I see them? A. These are—

Mr. Upton: Your Honor, we have the originals here or the file copies which we, of course, would like to protect for our files. We have also made a complete copy of our file copies which we would like to introduce in evidence or would like to tender for the purpose of being introduced.

The Court: Do you have those file copies Mr. Upton speaks of?

[53] The Witness: Yes, sir. I have two xerox copies of everything plus our complete files.

The Court: Will you accept the xerox copies?

Mr. Davidson: Yes, I will.

The Court: All right.

The Witness: How far do you want to go? I have our letter requesting them. I have their letter submitting them.

The Court: What was the date of your first letter, Mr. Saunders?

Mr. Saunders: We requested these by letter of November 8, 1968.

The Court: Was that pursuant to this IM 80-1-68?

The Witness: Yes, sir, that's correct. They gave us the assurances required by the IM 80-1-68 dated September 5, 1968. November 20th, 1968 we sent another letter to the State Road Commission advising them that it would be necessary to update these assurances in accordance with one of the amendments made to the IM 80-1-68(2). That whole assembly is right here, sir.

Q. Mr. Saunders, I show you Plaintiffs' Exhibit Number 5 and ask you to compare it with the letter you describe dated November 13th, 1968 and ask you whether that is the same letter. [54] A. Does this require that I read both of them in their entirety or can I just scan them?

Q. I think you may scan them. A. Sir, they appear to be the same.

Q. I ask you to look at the letter dated November 20th, 1968 and compare it with Plaintiffs' Exhibit Number 6 and ask you whether the letter dated on that date is the same as Plaintiffs' Exhibit Number 6. A. Sir, it appears to be the same.

Mr. Davidson: Please mark for identification this letter as Plaintiffs' Exhibit Number 7.

Plaintiffs' Exhibit Number 7
for Identification

The letter referred to was marked as indicated above.

Q. I show you Plaintiffs' Exhibit Number 7 for identification and ask you to examine and identify the exhibit. A. This is our letter advising the State Road Commission to amend their original submission, I believe of November 13th, in accordance with the amendment to our IM.

Q. Was Plaintiffs' Exhibit Number 6 the answer to this letter? A. Yes, sir. This is the first one they sent us

and this is the amendment thereto to cover the amendment made in our IM.

Mr. Davidson: We offer Plaintiffs' Exhibit Number 7 [55] in evidence.

The Court: It will be admitted.

The Clerk: Plaintiffs' Exhibit Number 7 admitted in evidence.

Plaintiffs' Exhibit Number 7

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Has your office requested any further assurances from the West Virginia State Road Commission? A. Sir, we have requested a number of what I refer to as assurances. I can run through a brief list of them for you and you can pull out what you want. How is that?

Q. If you can show them to me, that might be the quickest way. A. Section 35 of the 1968 Highway Act required certain assurances similar in some respects to the ones we have just talked about. We requested those from the State Road Commission by letter of September 3, 1968. We have a letter from the state providing its assurance on September 5th, 1968.

Q. May I see those? A. Okay.

The Court: Does that deal with these two particular projects, Mr. Saunders?

The Witness: No, sir, these are statewide. These are [56] statewide assurances. They apply to the extent that they are applicable.

The Court: Yes.

The Witness: Here is our xerox copy of our letter to the state dated September 3d, 1968 wherein we requested these assurances. This is a copy of our letter to the State Road Commission advising

them that these assurances were acceptable to this division office.

Q. Do these assurances in any way apply to the provision of relocation assistance? A. Yes, sir.

Q. In what way? A. They are assurances that are required in accordance with our IM 80-1-68, which, of course, is entirely in the area of relocation assistance.

Mr. Davidson: Your Honor, may we have this identified as a collective exhibit Plaintiffs' Exhibit Number 8-A, B and C?

The Clerk: Plaintiffs' Exhibit Number 8-A, 8-B and 8-C marked for identification.

The Court: And admitted.

The Clerk: And admitted.

Plaintiffs' Exhibit Number 8-A—8-C

The letters referred to were marked for [57] identification as indicated above and admitted in evidence.

Q. Mr. Saunders, pursuant to what provision of Instructional Memorandum 80-1-68 are those assurances required? A. Is it all right if I use my marked copy of this?

Q. Surely. A. Paragraph 5a of IM 80-1-68 page 2 requires that the state submit five assurances.

Q. What subparagraph were those assurances which have been marked Plaintiffs' Exhibit 8 submitted under? A. I don't know what Plaintiffs' Exhibit 8 is right now, sir.

Q. It is the one you have just testified to. A. 5a?

Q. I will now show you a copy of Plaintiffs' Exhibit 8-A to C. A. This is Section 35 assurances. I may have been wrong when I said that these particular assurances were required by the IM itself. These assurances were as I understand it required by the Act, the 1968 Highway Act. We were advised by our regional office—not our regional

office; from our Washington office—that these assurances were likewise required. I may have misled you when I said that the Section 35 assurances were directly out of the IM 80-1-68.

Q. Has the Bureau of Public Roads requested any further [58] assurances from the West Virginia State Road Commission pursuant to Instructional Memorandum 80-1-68? A. Sir, it depends on how you determine or define an assurance. I consider, myself, a legal opinion an assurance. It was built into that section of the IM, which the state did submit that.

Q. They did submit a legal opinion? A. Yes, sir, they submitted legal opinions.

Q. May I see a copy of that legal opinion? A. Which one do you want?

Q. All those that would be required under 80-1-68.

The Court: Mr. Saunders, did I understand that you brought xerox copies of all of the information that you felt might be germane to this question?

The Witness: Yes, sir.

The Court: And is it in that book?

The Witness: It is in this book, and we have a pretty fair duplication of it in this book.

Mr. Davidson: If I might have the opportunity to take five minutes to leaf through it I might shorten the examination. These were the kinds of documents, your Honor, which we had hoped to obtain through discovery in an effort to shorten this proceeding.

The Court: And which the Court unconscionably [59] denied to you. Right. Well, I am going to give you about an hour and a half to look them over. We are going to recess for lunch, gentlemen, until 1:30. Do you have something, Mr. Upton?

Mr. Upton: I wanted to clearly define what we

are turning over. I assume Mr. Saunders will give him the black notebook.

The Witness: Yes, sir, the black notebook.

The Court: Whatever that connotes.

Mr. Upton: The other notebook he has contains some of his work papers and some of his notes and so forth for preparation of testimony.

The Court: Yes, sir.

Mr. Upton: And I would prefer that counsel not be given that copy.

The Court: That's right. We will observe Hickman v. Taylor and a lot of other things on that.

The Witness: Could I speak to Mr. Upton in view of what he just said?

The Court: You can speak to him during recess about anything you want to. We are going to recess until 1:30.

(At 11:55 a.m. a recess was taken until 1:30 p.m.)

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[60] AFTERNOON SESSION

The trial was resumed at 1:45 p.m. pursuant to the recess noted above.

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[61] • • •

Mr. Davidson: May I have two exhibits marked for identification? That would make it easier in the examination.

The Court: All right.

Mr. Davidson: First, please, Number 9.

The Clerk: Plaintiffs' Exhibit Number 9 marked for identification and Number 10 marked for identification.

Gerald B. Saunders—for Plaintiffs—Direct

Plaintiffs' Exhibits 9 and 10 for Identification

The papers referred to were marked as indicated above.

GERALD B. SAUNDERS resumed the stand, having been previously duly sworn, was examined and testified further as follows:

[62] *Direct Examination by Mr. Davidson* (continued):

Q. Mr. Saunders, please examine the Plaintiffs' Exhibit Number 9 for identification and identify the documents contained in the exhibit. They were withdrawn from your folder. A. I will take them in order from the bottom up in the sequence of dates. We have a U. S. Department of Transportation Circular Memorandum from Mr. Turner, Director of Public Roads, to Regional Federal Highway Administrators and Division Engineers. Subject: Relocation advisory assistance services.

Q. What is the date of the memorandum? A. January 23, 1968. The second in the chain is our letter to the state dated February 2d, 1968, transmitting this memorandum to them and requesting certain information. The next is the state's letter to us of March 20th, 1968, responding to both our letter and the Circular Memorandum. Then on top is our memorandum of March 25th, 1968 back to the originating source.

Q. The final letter to which you referred of March 25th, 1968 contains a statement that "In the Charleston area the State did secure valuable information relative to persons to be dislocated by a survey which was a valuable assist in defining the overall problem involved. It would not be considered, in our opinion, a complete relocation plan since [63] it did not provide information either factual, estimated or projected as to the availability of replacement housing."

Has the State Road Commission since the date of this memorandum supplied the information described in the letter of March 25th, 1968, Plaintiffs' Exhibit Number 9? A. Can I see the March 25th letter? I am going to have to do a little glancing here, if it is all right with you.

Q. Yes. A. This is the March 25th, 1968 letter, long before the requirements of the law, which was August 23. The questions that were set out in the Washington office memorandum were what we were getting back to and we were getting answers from the state and giving them back to the proper people in Washington prior to August 23.

The only reason that is in there—and I believe that I initiated this—the only reason that that is even in that particular memorandum of March 25th, 1968 was just to point out that it was one-half of a relocation plan. It was not considered in our opinion required that they have a complete one. In fact, there was no requirement that they have any that I know of.

Q. Did the State Road Commission reply to the letter of March 25th, 1968? A. There is no reason for them to reply since this is a [64] memorandum from the then Division Engineer, Morris Monroe, to our Regional Federal Highway Administrator. There is no reason. They never even knew that this existed. That's interoffice or interdepartmental correspondence that the state had no way of knowing even existed to my knowledge.

Q. Is your testimony, then, that your office never informed the State Road Commission that their information did not constitute a complete relocation plan? A. There was no need to because there was no need for a relocation plan. That's just an informational point only. If anything, it points up the fact that the state prior to any requirements by us, at least, had half of a plan. It's to their credit, I would say.

Mr. Davidson: We offer Plaintiffs' Exhibit Number 9 in evidence.

The Court: It will be admitted.

Plaintiffs' Exhibit Number 9

The exhibit, previously marked for identification, was admitted.

Q. Mr. Saunders, please examine and identify Plaintiffs' Exhibit Number 10 for identification. A. This is another memorandum from the Division Engineer to our Regional Federal Highway Administrator of November 19th, 1968 in response to a request of our Washington [65] office, I believe, of us.

Q. What was the request, Mr. Saunders? A. Relocation advisory assistance payment report and procedures. It was required by Bureau of Public Roads Circular Memorandum of 11/8/68. It was a report to be prepared by our office and submitted back in to our region, who in turn I assume sent it to Washington.

Q. Does Plaintiffs' Exhibit Number 10, pages 2 and 3, describe information which is to be gathered in preparation for a relocation plan?

The Court: Is this a memorandum?

Mr. Davidson: Yes.

A. Yes, sir. All this is, sir, really is a transmittal, at least this part of it, of certain State Road Commission forms that they developed back in early September of 1968, transmitting these forms that they would use, subject to some revision after proper time for testing and transmitting them to our Washington office, just keeping our Washington and regional office advised of what progress the state was making in the area of implementing the 1968 Highway Act.

Q. Did you examine the forms yourself? A. Yes, sir, I examined the forms. I would be hard pressed at this time. That's quite a while back.

Q. Can you describe the general purpose of the forms? [66] A. Yes, I think from this I can.

Q. What would they be? A. Number 1 is the exhibit and these are exhibit numbers that I gave them. This was a draft copy of a proposed relocation assistance brochure which is required by IM 80-1-68; in draft form, I might add.

The second exhibit, 2 and 2-A, are forms which have to be filled out by the field relocation worker through his contact with eligible relocatees. Exhibit 3 is a relocation inventory survey to be initiated by the field relocation worker, and from that description at this point I can't accurately describe which one that is.

Exhibit 4 and 4-A is an application for reimbursement for relocation moving expenses, and I believe that that particular form is one that the eligible dislocatee submits to the State Road Commission. I think that's what that one is. Exhibit 5 is a claim for reimbursement of relocation moving expenses.

I have to back up. The exhibit 4 is the application. Exhibit 5 ties in with that to the extent that it is the actual claim that the person puts in. Exhibit 6 was a self-move claim for business. Exhibit 7 was a claim for reimbursement for residential individuals and families, a claim form.

Exhibit 8 is a relocation quarterly status [67] assistance and payments report. I don't recall exactly what that is. Exhibit 9 is the relocation recap sheet which indicates the value of and/or rent paid by tenants as well as available replacement housing by valuation categories for owners and tenants, and I don't even know what that is at this point.

Exhibit 10 is a displaced person data form which is essentially a recap sheet for all relocation assistance ac-

tions. Again I don't know exactly what that one is. Exhibit 11 is specific information relative to available replacement housing. At this point I'm not sure that I can describe it further than that either.

Exhibit 12 is a form that the state had to utilize when heating requirements become a factor as to whether or not a property is safe, decent and sanitary. This particular form sets forth a method whereby a layman with some training could determine whether or not a house fell within the proper range.

Exhibit 13 is a broker's statement of safe, decent and sanitary available housing. I believe this, sir, is a form that's filled out by real estate people, or at least this was a proposed use of it. Whether it is to be implemented ultimately or not I can't say, where the broker would indicate he had X properties for sale and they were in his opinion and to the best of his knowledge and belief safe, decent and [68] sanitary.

Exhibit 15—summary of all available housing. I believe they might have had a form, I believe that they had a form which tabulated out locations and various types and categories of housing that was on the market which they proposed to use.

Exhibit 16 is summary of replacement housing needs for both owners and tenants. I believe this form was geared to the actual displacee, what he needed because of so many people, square footage, room size, and so forth.

Exhibit 18 is a proposed form for initiating an appeal. One of the paragraphs in our form requires that the state advise dislocatees of their right to appeal if they are unsatisfied with any aspects of relocation, and I believe that was that form.

Exhibit 19 is a certification required of the replacement housing appraiser. This is a certification to the effect that to the best of this replacement housing appraiser's knowl-

edge and belief that this house does qualify. Exhibit 20 is a statement of eligibility for supplemental replacement housing payments. This I can't—this is too brief for me.

Q. I think that might cover— A. I have only got one more. Exhibit 21 is an application to the State Road Commission for supplementary replacement [69] housing payments, which I assume from that that we are talking about a form that the dislocatee would send in to the effect that he is now eligible for these payments.

I would add that all of these forms—this is November 19th, 1968. I am confident that some of these forms have been revised and updated. This is just an initial shot and we were just trying to keep Washington advised of what the State of West Virginia was doing.

Q. Mr. Saunders, were these forms submitted to you with information contained on them or were they blank forms? A. They were blank forms. In fact, we picked these up at a state training session held at Jacksons Mill, West Virginia, for three days, September 15, 16 and 17, at which time the state was explaining to their own people how these forms were to be used or they envisioned that they would be used.

Q. Has your office required the State Road Commission to fill out any of these forms? A. No, sir.

Q. Has your office required the State Road Commission to fill out any forms showing the availability of relocation housing? A. That's kind of a broad question. They, of course, have to fill out all of these forms whenever they are [70] applicable to a given case or situation. They have to do this. This is built into their acceptance of our procedures. The whole business is geared to the fact that they will—as a part of providing relocation assistance that these forms are filled out and properly so.

Q. Has your office required at any time that the State Road Commission fill out any of these forms in relation

to I-77-3(66)100? A. This question as you asked it, the answer is no. It goes without saying that the State Road Commission is bound by their own operating procedures to do this kind of thing. Not only those forms; there are other forms in the same manner as an appraisal report.

They have to fill out an appraisal report, which is a form, but we don't say, "Go fill out an appraisal report or make an appraisal on parcel ten." The relation with the Bureau does not work this way; an example being there are myself and three people in our office. The state has 200 such right of way people.

It is based on their acceptance of our procedures and their assurance to us that they will operate within the bounds of these procedures. We don't give specific authorization, so to speak, to fill out form X on parcel ten and submit it to us. This is not done.

[71] Q. Do you require the submission of any forms? A. No, we have not required the submission to our office of any forms by the State Road Commission in conjunction with this on either one of those projects.

Q. You are referring to both projects designated on Plaintiffs' Exhibit Number 1? A. This is correct.

Q. Mr. Saunders, I would like you to refer to Plaintiffs' Exhibit Number 2, which is the Instructional Memorandum numbered 80-1-68. A. Yes, sir.

Q. And ask you to refer to page 6, which begins with paragraph 7 entitled "Development of Relocation Program Plan". A. Yes, sir.

Q. Halfway down the page to item b., right of way acquisition and/or construction stage, and first the subparagraph (1).

The Court: Wait a minute. What memorandum is this?

Mr. Davidson: 80-1-68.
The Court: 80-1-68?
Mr. Davidson: Yes.
The Court: What page?
Mr. Davidson: Page 6.
The Court: All right.

[72] Q. Has the West Virginia State Road Commission furnished to the Division Engineer the information required by subparagraph (1)? A. No. Not on this project, no.

Q. Why isn't it required on this project? A. Well, I would have to refer you to a couple of other memoranda that you have, I believe. It is a Circular Memorandum from Mr. Swanson, the Director of Right of Way, Bureau of Public Roads, Washington, D. C., to Regional Federal Highway Administrators and Division Engineers. It is dated February 12, 1969.

The second paragraph, "In accomplishing the planning for the relocation program required under paragraph 7, the State should undertake such planning on all active projects to the extent that is reasonable and proper. Each such project undoubtedly will involve a different set of circumstances and conditions.

"It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any additional authorizations to acquire right of way or to authorize construction on a project for which right of way was acquired after August 23, 1968, irrespective of the source of funds utilized for such acquisition, to assure himself that the State has or will make the necessary relocations [73] without undue hardship to the relocatees."

The last sentence in that, "If a major portion of the relocations have previously been accomplished very little

good would result from going through the conceptual stage study." That's 7a.

"However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b. Some variation may be permitted by the division engineer when the circumstances warrant."

Q. I would like that into the record. I wonder whether you could find— A. You have it in your Exhibit 2, which is that folder. I think it is at the top.

Q. Mr. Saunders, is the letter from which you just read the top page of Plaintiffs' Exhibit Number 3? A. Yes, sir, that's it.

Q. I ask you again, Mr. Saunders, why has the Division Engineer not required the information required by paragraph 7b subparagraph (1)? A. Right of way acquisition had been authorized prior to August 23, 1968. In the particular CM it say "any additional authorizations to acquire right of way". That's [74] number one. We were—at least I was to my own satisfaction aware that the state had maintained close surveillance over all projects in the Charleston urban area. That's number two. We knew of this plan that you referred to a while ago, the one that I said was half of a relocation plan. We knew they had that. That was made—I believe the date sometime late in 1966. That particular plan or half of a plan, whatever you want to call it; study.

Q. Were you concerned with the relocation of the other half? A. There was no need. It wasn't required. It was submitted by the state. It was made in late 1966 prior to the effective date of the law or the IM. Therefore it wasn't

required. There was no relocation plan required prior to August 23, 1968 under any circumstances that I know about.

The state had provided the assurances, 5a assurances, the Section 35 assurances, so we had a certain amount of protection right here. The ninety day business and so forth states people who relocated after August 23, and the state has to my satisfaction demonstrated that they understand what was expected insofar as relocation assistance is concerned. I can give you some reasons for this if you would like to have them.

Q. I would like to know, Mr. Saunders, has the state [75] demonstrated the existence in fact of relocation housing for persons yet to be displaced in the projects designated on Plaintiffs' Exhibit 1? A. I didn't understand the question, sir.

Q. Has the State Road Commission demonstrated to you that relocation housing exists in fact for persons who will be displaced, have not yet been displaced from projects designated on Plaintiffs' Exhibit Number 1? A. They have to my satisfaction, based on the two years' experience that I have had in this office closely watching their whole right of way operation, satisfied me that they can relocate the people in the Triangle area and other areas.

Q. What is the basis of your satisfaction, Mr. Saunders? A. It goes real deep. First of all they held a—let's start with the relocation plan. It isn't a relocation plan. I keep using that term. They were concerned. They indicated to me that they were aware of the relocation involved in a broad sense.

They proceeded to prepare statistical information concerning the whole Charleston urban area, as I remember it, concerning relocation. This was done in December 1966. I believe I am correct on those dates.

Gerald B. Saunders—for Plaintiffs—Direct

Q. Is that the information—

[76] Mr. Preiser: Let him finish his answer.

The Court: All right. Let him finish his answer, Mr. Davidson. Go ahead.

A. When I came to West Virginia in February of 1967 I came here from the Illinois Division. I had been working the Chicago area, where highways are always disruptive to people, businesses, you name it. You have got it.

I came here with a very keen awareness myself of relocation and I felt like I knew basically where to start looking and checking it out. My first move into the area of relocation was made March 22, 1967. This is on my part, and it covered three projects, two of which are in Charleston.

July 17th and 18th I again reviewed relocation assistance. All of these projects at that time were in Charleston. February 9th, 1968 I again reviewed relocation assistance on four projects, three of which were in Charleston.

I have been in meetings with Urban Renewal. I have met with FHA. I have prepared various reports concerning relocation in general and in Charleston specifically. In March of 1968 we did what we refer to as an inspection in depth on relocation assistance. This is a detailed in depth report prepared by the Division Office of the Bureau of Public Roads.

It is a report from me to the Division Engineer and [77] before it is released to the state it is cleared by our Regional Office, and sometimes the Regional Office will sit in on these discussions.

August 5th I had occasion to look into some complaint relative to a newspaper article. September 9th, 1968 I met with state HUD people regarding relocation in Charleston,

and September 15, 16 and 17th, 1968 I attended SRC sponsored relocation assistance meeting concerning the 1968 Highway Act and IM 80-1-68 in its then draft form, which was held at Jacksons Mill, West Virginia. September 19th I prepared a report concerning this meeting.

September 30th I attended a meeting at Cacapon State Park with Washington and regional state people, also people from the states of Pennsylvania, Ohio, Delaware, Virginia, West Virginia, District of Columbia and Maryland.

This as far as I am concerned outlines briefly the areas that I have been involved in in relocation assistance in the state. Since March of 1967 I believe that I have an exhibit that shows we reviewed 512 cases of relocation assistance on these projects.

The Court: On what projects?

The Witness: These are statewide. These are all the projects throughout the state within our jurisdiction. Based on this information I was satisfied that the State Road [78] Commission was able, completely able, in fact, to operate under IM 80-1-68 and the 1968 Highway Act insofar as relocation assistance is concerned.

Q. You indicated that you relied upon statistical data prepared in December 1966. Is that the data which you have described to us as half a relocation plan? A. This is the date, as I remember it, of the state study. I don't think it is really proper to call it a relocation plan. It doesn't in any way resemble it.

Q. But you relied on it? A. Relied on it as an action in good faith on their part. They went out to see what the needs were going to be. As far as I was concerned it

was a positive effort. They did it and it wasn't required. I had never seen it done before I came to West Virginia.

Q. Have you brought with you any of the analyses which you have testified you have undertaken concerning the availability of relocation housing? A. I have some interoffice memoranda here, yes, sir.

Q. May I see them?

The Court: Are these xerox copies too, gentlemen?

The Witness: Yes, sir. These are the memoranda written concerning coordination with other government agencies.

Q. Is this the entire set of the analyses which you [79] have undertaken? A. No. It's just one of them. That's just one.

Q. Do you have the others with you? A. Yes, sir; right here.

Mr. Upton: Your Honor, until there has been some demonstrated need for these, I'm not sure I understand what we are after. I'm not sure what Mr. Saunders has in his hand, to be perfectly frank. If these are specifically interoffice communications between Mr. Saunders and his superiors, I'm not sure it is proper that these be turned over to counsel. I don't know where counsel is trying to go, is what I am saying, with these documents.

The Court: Mr. Upton, you seem to have trouble following the esoteric route that this inquiry is taking here.

Mr. Upton: That is correct, your Honor.

The Court: I don't know either whether these are germane to the issue before us but I want to give this gentleman every latitude, and I don't see any reluctance on the part of Mr. Saunders to turn them over to him. Go ahead. Do you have them?

The Witness: Yes, sir, they are all here.

Q. Are these in sequence? A. I think they are, yes, sir. I think you will find them in sequence.

[80] Q. Is this, then, a complete set of analyses, Mr. Saunders? A. That doesn't constitute everything. That constitutes only the studies that we have made that we have documented our files concerning. I have, for example, I should have—I assume our procedure is working properly downstairs—I should have a form for each of these 512 here, which is a little work form.

The Court: And those are statewide?

The Witness: Yes, sir, these are statewide and they also include this project.

Mr. Davidson: I would like to have the first set of documents marked as a collective exhibit, Number 11.

Mr. Upton: May I see the document?

The Court: Yes. What is the relevancy of this?

Mr. Davidson: The relevancy, your Honor, is that the Federal Department of Transportation is required by the 1968 Act to make a determination that assurance is given to it by the West Virginia State Road Commission or satisfy that is a proper subject for judicial review to determine whether they have acted arbitrarily and capriciously in making that determination.

This appears to constitute the entire administration record. We would have hoped, again, to have had a chance [81] to examine these prior to the hearing, but at this point I would think the most expeditious course to take is to introduce them into evidence and analyze them.

Mr. Upton: Your Honor, first of all this witness has already indicated this does not constitute the entire Bureau of Public Roads files in regard to the State of West Virginia on its relocation procedure in the state.

The witness in addition has testified that no plan was required on this project of relocation. That is a subject I assume of further controversy in this matter and a matter of law perhaps. I don't know what is contained in the file Mr. Saunders has just handed him, but it obviously, number one, is not complete according to Mr. Saunder's own testimony, and whether it is favorable or in some way critical of the Road Commission I don't think it would be proper to have it in there in part. Mr. Saunders has already testified at some great length why he had—

The Court: Do you know what specific areas these items deal with, Mr. Saunders? Do you have any idea?

The Witness: Yes, sir. I can briefly summarize some of it. I can't be held to every statement.

The Court: Does all of it deal with Charleston?

The Witness: I don't know that it all does, sir. I believe maybe in some respects it does but I don't know for [82] sure without examining each one.

The Court: Does any of it deal with this particular area here?

The Witness: I would judge, sir, that it did.

The Court: Do you have anything dealing with the two projects that are under discussion here that would not be included in these that you know of?

The Witness: Yes, sir. I have—we have reviewed on these two projects in question. Our records indicate that we have reviewed on (66) seventy-five relocation records of the state. When we review a relocation record of the state we fill out a little form or check list or whatever.

The Court: You referred to what, now?

The Witness: It is (66). I-77-3(66)100.

The Court: Is that the one to the left?

The Witness: Yes, to the left. On the other project (67) we have a similar set of records on forty-eight reviews we have made of relocation assistance. I think I have an example of one of these reviews if you would like to see it.

The Court: I think that would be helpful. These would be more or less characteristic apparently of what they have done along this line. Let me ask you this. Under the '68 law and the regulations and what not is everybody who is displaced by an interstate project eligible for participation [83] in this program?

The Witness: Yes, sir.

The Court: As a dislocatee. Is that what you call them?

The Witness: Displacee, dislocatee, yes, sir. Prior to the enactment of the law there were provisions

that the state had to provide assistance. This encompasses keeping certain records available, replacement housing, setting up a field office, relocation field office, keep available replacement housing.

The Court: Let me stop you right there. Would that apply just as well to, let's say an affluent citizen who lived we will say up in the Fort Hill section whose property is going to be taken as it would somebody in the Triangle section?

The Witness: Yes, sir.

The Court: What are the benefits they can get under this '68 Act?

The Witness: Under the 1968 Highway Act— can I briefly review the '62 Highway Act? It won't take but a minute.

The Court: This seems to be the modus operandi.

The Witness: The '62 Highway Act essentially provided for relocation assistance being provided by the states or a political subdivision if the state entered into a [84] contractual arrangement with them. All they had to do was to provide assistance. It required assistance. In those states, based on the 1962 Highway Act in those states that had enabling legislation of their own they could make payments for moving cost, only $200 in the case of a family or individual, up to $3,000 in the case of a business. This is basically—

The Court: That would be in addition to the condemnation or the agreed acquisition cost?

The Witness: Yes, sir, that's correct. Enactment of the 1968 law expanded this tremendously. The 1968 Highway Act is basically broken down into

again what we refer to as providing the assistance and payments. The payments go up. The eligible dislocatee can receive up to $25,000 for relocating his personal property if it is determined that he is eligible.

The Court: What determines that he is eligible?

The Witness: In the case of a family he has to have occupied the house—if he is an owner-occupant he has to have occupied the house for one year prior to the initiation of negotiations. This is the key on getting replacement housing benefits. This replacement housing benefit can go up to $5,000. If he is a tenant that was not an owner—

The Court: Let's stop with the owner first. What determines as to how much of this $5,000 he gets? In other [85] words—

The Witness: In the replacement housing, sir, it is determined by surveys conducted by replacement housing specialists or replacement housing appraisers employed by the State Road Commission.

The Court: What are the criteria? Again let me take one of our friends up on Fort Hill. Let's say he sells his house or it is condemned but let's say he receives $60,000 for it. Now, under what conditions would he participate in this $5,000 bounty?

The Witness: If it cost him $63,000 to replace or to get a house similar to that one that was taken, he would be entitled to $3,000, the influence of the market rising, this kind of thing. He would get the $3,000.

The Court: Who determines that?

The Witness: The State Road Commission determines it, sir. They determine how much he is en-

titled to based on surveys and studies that they make. For example, if you want the details, I think I can relate it exactly how they do it.

The Court: Suppose he moves up to Kanawha City and buys a $65,000 house and he comes in and says, "This house is the best comparable to the one that you gentlemen took and paid me $40,000 for. Frankly, I don't think it is but I am willing to settle for the maximum benefit of $5,000 under the [86] 1968 Act." Would he get it?

The Witness: Not just because of that. It has to be based on a state determination that you did—that he did in fact have to go to Kanawha City and the house was comparable and there was in fact an indication of an increase in the market cost of property. The State Road Commission has to establish the amount based on their studies.

The Court: And suppose he is disappointed. Then you have this review procedure you refer to?

The Witness: Yes, sir. There is an appeal procedure built into the IM and it is in the State Road Commission relocation brochure which is given to everybody.

The Court: Is there any end to that? Is there any provision for judicial review from that particular facet of it?

The Witness: I can't answer that question. I don't think there is.

The Court: I hope not. Now tell me about the tenant.

The Witness: The tenant has to have occupied the quarters he is being displaced from for ninety days before negotiations begin to acquire his property.

This automatically makes him eligible. The state again surveys the market in the same manner that they would the owner, only they are looking for rental property this time.

The Court: All right.

[87] The Witness: He is paid the difference in what it would cost him to go rent comparable property, comparable to what he was paying before being dislocated.

The Court: For how long?

The Witness: For two years.

The Court: How about our householder who merely has a room in a hotel?

The Witness: He is eligible for the same benefits that the tenant would be. There is one point I have missed. All of these people are eligible for moving costs in addition to what we have just talked about.

The Court: Everybody?

The Witness: Everybody is entitled to moving cost. The man in the hotel who occupies a room, he is automatically entitled to moving costs based either on a fixed schedule that the State Road Commission has or what it actually cost them to package stuff up and move it.

He is in addition—and this applies also to the other displacements—entitled to what we call a dislocation allowance. This is a flat $100 allowance, moving costs up to $200, dislocation allowance $100 on top of that.

The Court: A total of $300?

The Witness: Yes.

The Court: What is the flat hundred dollars for?

[88] The Witness: We call it a dislocation allowance. I assume it is for such things as buying new drapes, getting the rugs to fit, getting utilities hooked up, this kind of thing.

The Court: I am talking about the man in a hotel.

The Witness: Well, he may have the same problem, sir.

The Court: Go ahead.

The Witness: We have got the moving costs of up to $200 in the case of a family or tenant; we have got the $100 dislocation allowance. Then we go into replacement housing, which I have already described, up to $5,000 in the case of an owner and $1500 in the case of a tenant.

If an owner has not lived in his house for one year, which he had to to get the $5,000, if he has lived there at least ninety days he is eligible for the benefits of a tenant up to $1500.

Then they are entitled to what I refer to as legal costs in transferring the property from them to the state, pro ration of taxes, normal transfer costs. For businesses, there is a procedure whereby businesses can be reimbursed generally speaking along these same lines. They have a schedule, actual cost method. There are some differences.

Mr. Preiser: Your Honor, I think he forgot the [89] interest differential on down payments.

The Witness: I am not qualified to talk about that, Mr. Preiser.

Mr. Davidson: Mr. Saunders has described two parts of the Highway Act which are not germane to this controversy. The remaining section of the

relocation law requires that there be housing to move to, replacement housing.

Congress determined that it was not enough that someone have moving expenses to move nowhere. There have to be houses to move to. That's the gist of this controversy.

The Court: I just asked him that question for my general edification, Mr. Davidson.

Mr. Davidson: We remain with the problem of these exhibits.

The Court: Go ahead. Go ahead.

Mr. Davidson: Please mark—

The Clerk: Plaintiffs' Exhibit Number 11 marked for identification.

Plaintiffs' Exhibit Number 11
for Identification

The papers referred to were marked as indicated above.

Mr. Upton: Your Honor, I would renew my objection and then request permission to look at them.

The Court: You will get a chance in a few minutes.

[90] Mr. Preiser: When Mr. Upton looks at them I would like to look at them. They are not in my files.

Mr. Davidson: I too, your Honor, haven't seen them.

The Clerk: Plaintiffs' Exhibit Number 12 marked for identification.

Gerald B. Saunders—for Plaintiffs—Direct

Plaintiffs' Exhibit Number 12
for Identification

The papers referred to were marked as indicated above.

The Court: We will call a recess in a few minutes and all of you can go out and look at them. Go ahead, Mr. Davidson. Do you want to question him on these?

Mr. Davidson: Just a brief identification and offer.

Q. Mr. Saunders, I show to you Plaintiffs' Exhibit Number 11 for identification and ask you to examine and identify the exhibit. A. This is a chain of correspondence from myself. I believe there is something in here from the state concerning making housing available to the State Road Commission on a priority basis, VA housing, in order that it would be conceivably utilized for displacement purposes or replacement housing purposes.

Q. I show you now Plaintiffs' Exhibit Number 12 for identification and ask you to examine and identify that collective exhibit. [91] A. Generally this is a series of memoranda, interoffice memoranda, concerning relocation assistance. That's about the word.

Mr. Davidson: Let me offer Plaintiffs' Exhibits 11 and 12 into evidence.

The Clerk: Plaintiffs' Exhibits 11 and 12 admitted.

Plaintiffs' Exhibits 11 and 12

The exhibits referred to, previously marked for identification, were admitted in evidence.

Q. Mr. Saunders, referring back to pages 6 and 7 of Plaintiffs' Exhibit Number 2, Instructional Memorandum

80-1-68, just for the record referring to subparagraph (2), would the requirements of subparagraph (2) apply to the projects designated in Plaintiffs' Exhibit Number 1?

The Court: Wait a minute. Are you in the conceptual stage or the right of way acquisition and/or construction stage?

Mr. Davidson: Right of way and/or construction.

The Court: Okay.

A. This is just item (2), sir?

Q. B(2). A. Yes, sir. That whole—actually the whole Section C-B is along the same line.

Q. That is, you did not consider them applicable? A. Did not consider them required.

[92] The Court: I didn't hear you.

The Witness: Not required by the IM on these projects. They are not applicable for the reasons I cited earlier.

The Court: Because these projects were initiated prior to August 23?

The Witness: Yes, sir.

Q. Is your answer the same for subparagraph (3) on page 1? A. Yes, sir. This is the detailed relocation plan A through G.

Q. Are there properties in the projects designated in Plaintiffs' Exhibit Number 1 which have not yet been acquired by the West Virginia State Road Commission? A. I would assume so, sir. I can't speak of my own first-hand knowledge of that fact either way.

Q. Are there persons residing within the area of the

projects designated in Plaintiffs' Exhibit Number 1 who have not yet been displaced? A. Yes, sir.

Q. Was the fact that there are properties not yet taken and persons not yet displaced considered by you in determining that the provisions on pages 6 and 7 of Plaintiffs' Exhibit Number 2 are not applicable? [93] A. Yes, sir.

Q. What conclusion did you reach? A. We concluded that it was not required because it was a going project. One point I didn't indicate a few minutes ago, the fact that you stop negotiations—let's say for acquisition of property simply to get a plan, particularly on a project such as this, in itself can create some hardships for those people who have already gotten started towards buying new property. They weren't concerned about our IM's nor our laws. They knew they had to find places to live, which is another one of several reasons we used in reaching this decision.

Q. Did you do any studies to determine what the hardships might be? A. Yes, sir, I have made those analyses there. I certainly discussed it with my Division Engineer. I didn't make any study, if you mean in the sense of going out there and really getting down—I don't have the people to do this kind of thing and it isn't the Bureau of Public Road's function to do this.

The Court: Mr. Saunders, let me ask you something, just that you may shed some light on this 80-1-68 memorandum. On Page 3 a little below the middle, "b. Th above assurances are not required where authoritization to acquire right of way [94] or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of

this memorandum." What is the construction of that phraseology, that your group places on it?

The Witness: That particular item that you are talking about says that the assurances set forth in paragraph 5 are not required in those instances where authorization on a project basis was given to acquire right of way.

The Court: But what does it mean, "the State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum"?

The Witness: Well, it means if we had authorized right of way July 1st on the two projects in question and the state was just getting geared up to go out and start acquiring, in that instance where they really had not gotten under way and displaced a lot of people or bought a lot of property, I would have said we need a relocation plan on this program.

The fact that we authorized them to acquire right of way on these two projects in question, our first authorization to acquire right of way on I-77-3(66) 100 was issued April 19th, 1966. On the other project, the I-77-3(67)98, [95] I believe that's November 30th, 1966. I punched a hole right through the date. With our authorization to acquire those, we had authorized that way back and they had been in there displacing people. We made the determination not to require the plan.

The Court: You may have answered this. Do you have any way of telling us, do you have any way of demonstrating how many relocations—and when I say relocations I mean whether families or house-

holds—have been processed by the State Road in each of these projects since the respective authorizations for them to commence acquisitions up to, let's say, I would say first of all up to August 23, 1968 and supplemental to that date.

The Witness: I can't give you an answer as to those dates. I have some figures here that may be beneficial.

The Court: Give us the benefit of those figures, bearing in mind what we are referring to is these two projects.

The Witness: This is as of February 28, 1969. This is information that was developed through and with the cooperation of the State Road Commission right of way section. On Project I-77-3(66)100—

The Court: Which one is that, Mr. Davidson? How far does that go?

Mr. Davidson: It goes to Court Street, your Honor.

[96] The Witness: I am talking in terms of people. There remain yet to be moved approximately 380 people. That's on the (66)100.

The Court: What we have called A, I believe.

The Witness: There have already been relocated from this project 913 people.

Mr. Davidson: Your Honor, may I ask whether he is referring to the section shown here or the whole project, which goes beyond?

The Witness: Project. We deal in terms of project.

The Court: I agree with Mr. Davidson. What we are interested in here is that portion of the project

which starts at you might say the Elk River and comes on up to the easterly end of that project. Would you have a breakdown on that, sir?

The Witness: The only figure I have again developed from and with the cooperation of the State Road Commission is that there are approximately 284 people left in that area to be relocated.

The Court: In the Triangle area?

The Witness: Yes, sir, in the Triangle.

The Court: In Project A that we have referred to?

The Witness: That's the combined projects.

The Court: The whole thing?

The Witness: Both projects.

[97] Mr. Upton: For a point of clarification, I think this may help. I don't know whether the witness has made it clear the Bureau does not deal in the project as defined by counsel for the plaintiffs.

The Court: We understand that.

Mr. Upton: All right, your Honor.

The Court: Go ahead, Mr. Saunders. You said people in both projects and using the word project of the two areas we are concerned with here.

The Witness: This may be meaningful. On I-77-3(67) in the Triangle area 180 people. That's according to the State Road's information and so forth.

The Court: Remain to be relocated?

The Witness: Right.

The Court: Do you have any idea how many have already been relocated out of there?

The Witness: No, sir, I would be guessing.

The Court: How about the other section?

The Witness: The other section would be the difference between 180 and 284; about 104 on the other project.

The Court: Individuals?

The Witness: Yes, sir. People, yes, sir.

The Court: Go ahead, Mr. Davidson.

Q. Mr. Saunders, do you have that information as of [98] August 23, 1968 as well? A. No, sir, I don't have it as of that date.

Q. Mr. Saunders, do you know how many people are on the waiting list for projects operated by the Housing Authority in the City of Charleston? A. No, sir.

Q. Mr. Saunders, do you know what the vacancy rate in private rental housing is in the City of Charleston? A. No, sir, not today.

Q. Have you made any study of the problems of low and moderate income persons in obtaining housing in the City of Charleston? A. If you want to consider those reports a study or whatever, there are as I remember a couple of reports in there three or four pages long apiece which just deal with Charleston. I was not concerned about one section in Charleston. I was concerned about Charleston. There is some statistical information in there.

I think one of the statistics—for example, this report that I am talking about was made about one year ago exactly. It indicated there were 81 rental units available from one source. I believe it was from the private market. In checking this a few days ago, which we always periodically check to see how this thing goes, there was, amazingly enough, [99] 81 still remaining.

Q. Is that 81 units for several hundred people who will be displaced? A. That's not all. That's just one category

of rental units. You have got houses for sale and all these other things.

Q. Are most of the people in the Triangle area tenants or owners? A. My recollection is, sir, that the bulk of them are tenants.

Q. Have you made any study of the way in which racial discrimination might restrict the access of blacks to relocation housing in Charleston? A. You are going to have to give me that one again.

Q. Have you made any study of the way in which racial discrimination might restrict the access of blacks in Charleston to relocation housing? A. Not beyond the fact that I know that there is an open housing law here in Charleston, or enacted in some manner. This is about all I know.

Q. Does that law cover all types of housing accommodations? A. I know not, sir. I couldn't answer that question.

Q. Mr. Saunders, have you studied the analysis of [100] housing in the Community Renewal Program prepared for the City of Charleston? A. Is this an Urban Renewal plan or authority you are talking about?

Q. No, it is a comprehensive study of housing problems generally. A. No, sir.

Q. Have you studied any of the reports prepared in preparation for the Comprehensive Plan of the City of Charleston? A. No, sir.

Q. Have you studied the plans prepared in connection for any Urban Renewal projects in the City of Charleston? A. I have not studied them. I have read it and I wouldn't say I have studied them.

Mr. Davidson: Your Honor, I think we have concluded with the witness.

Gerald B. Saunders—for Plaintiffs—Cross

The Court: All right. Any cross, gentlemen?
Mr. Upton: Yes, I do, your Honor.

Cross-Examination by Mr. Upton:

Q. Mr. Saunders, what is your educational background, sir? A. B. A. Degree from Randolph Macon Men's College, [101] Ashland, Virginia. I have had postgraduate courses in real estate appraisal which were conducted jointly by the American Institute of Real Estate Appraisers and the University of Richmond at Richmond, Virginia; had various in-service and out-service training programs given by the Bureau of Public Roads.

Q. Mr. Saunders, what is your work experience in regard to the area in which you have just testified? A. I was employed by the Virginia Department of Highways September 1958, I believe is correct, until September 1962 as a right of way agent in the Fredericksburg District Office, Fredericksburg, Virginia, about four years.

September of '62 I left the State of Virginia, went with the Bureau of Public Roads, accepted an assignment as right of way officer in the Illinois Division Office, Springfield, Illinois. Involved in all aspects of right of way as far as federal aid projects are concerned.

In February of 1967 I came to Charleston, West Virginia as Division Right of Way Officer and am responsible to report to my superior on the whole right of way operation performed by the State of West Virginia.

Q. Mr. Saunders, you have testified at some length here concerning the provisions of IM 80-1-68 and its amendments. Would it be a fair statement to say that this IM and its amendments contain basically two general broad areas or [102] provisions, number one being a provision for relocation assistance, and number two for payments

under the '68 Highway Act? A. Yes, sir, that would be a fair statement.

Q. To make it perfectly clear, was the State of West Virginia required to submit under the provisions of IM 80-1-68 and its amendments a relocation plan for either of the two projects which are referred to as I-77-3(67)98 and right of way I-77-3(66)100? A. There was no requirement that a relocation plan be submitted on those two projects. It was not required.

Q. Will you explain again to the Court why it was not required? A. The Circular Memorandum that I referred to.

Q. That is the one dated February 12, 1969? A. Yes, sir.

Mr. Upton: That is the top sheet, I believe, your Honor, in Plaintiffs' Exhibit Number 3.

A. It essentially states that the Division Engineer shall carefully review the status of each project before issuing any additional authorizations to acquire right of way. There was no right of way authorization to acquire issued on these two projects after the effective date of the law, August 23, 1968.

[103] The Court: By that you mean all necessary authorizations encompassing both of these areas existed prior to that date?

The Witness: Yes, sir; they were issued.

The Court: You gave the date a while ago.

The Witness: We knew that the state had this detailed study. We knew that they were aware of the problems not only in Charleston and the Triangle but the whole state, and therefore plus the

additional fact that you can sometimes create more problem by stopping something than by leaving it alone, the Division Engineer after we discussed the matter decided that no relocation plan would be required, although we had a number of displacements that had been occasioned prior to this date.

Q. Mr. Saunders, you have referred to the right of way acquisitions or the authorization for the acquisitions of right of way given to the State Road Commission by the Bureau and you have given certain dates upon which right of way was first authorized to be acquired. Is that correct? A. Yes, sir.

Q. Was there any activity in regard to the acquisitions of right of way as far as Bureau approval prior to those dates? A. Yes, sir. On Project I-77-3(66)100 according to our files the first letter of authorization given to the state [104] was dated September 8th, '65. It was for preliminary engineering for utilities, right of way, abstracting incidentals. On January 5th, 1966 on the same project all we did there was transfer preliminary engineering for right of way to the construction project, so we did have a prior right of way authorization on what I refer to as (66).

On I-77-3(67)98 our first letter of authorization was June 1st, 1965 and it involved preliminary engineering for right of way, utilities, abstracting incidentals.

Q. It is my understanding from the questions asked by counsel for the plaintiffs and questions asked by the Court that the relocation payment phase of the '68 Highway Act and the implementation by 80-1-68 does apply to these two projects. Is that correct? A. Yes, sir. All monetary payment provisions set forth in the IM and the law apply to any person legally occupying property after August 23,

1968. They are entitled to all the payment provisions that they would normally be entitled to under the law.

Mr. Upton: Counsel for the plaintiffs have introduced a number of exhibits in regard to the implementation of 80-1-68, and although I hesitate to do this, your Honor, I feel it is necessary that Mr. Saunders go through this Instructional Memorandum 80-1-68 and provide for the record copies of the [105] assurances, legal opinions and so forth necessary to implement 80-1-68.

Q. If you will, explain the Memorandum and the documents necessary to put it into effect. A. This is just the assurance. Is this correct?

Q. Anything necessary submitted by the State of West Virginia and documents submitted by the Bureau of Public Roads in order to implement 80-1-68. A. The legal opinion which is required by paragraph 5c was requested by us of the State Road Commission by letters dated September 4th, 1968 and September 12th, 1968. They submitted three legal opinions, one September 13th, '68, one September 20th, '68 and one November 7th, '68.

We transmitted these legal opinions to our Washington office through our Regional Office where they were accepted by our Chief Counsel, or the last one was, and approved by Mr. Turner on December 13th, 1968.

Q. Do you have that group of documents? A. I believe I don't find all that I originally had. Here is one, November 7th, which is the one that was ultimately approved. This is our letter to the State Road Commission advising them that it had been approved. That's dated December 13, 1968. Here are the other two, sir.

Gerald B. Saunders—for Plaintiffs—Cross

The Clerk: Defendant Volpe Exhibit Number 1 marked [106] for identification.

Defendant Volpe's Exhibit Number 1 for Identification

The papers referred to were marked as indicated above.

Q. I hand you back what has been marked for identification Defendant Volpe's Exhibit Number 1 for identification and ask you now if you will describe to the Court as briefly as possible what that document is and the significance of it to 80-1-68.

The Court: Isn't this the composite, the three opinions and Volpe's response?

Mr. Upton: The approval.

The Court: That's what I thought it was.

Mr. Upton: That's correct, your Honor. That's what it is. I wasn't sure I had brought it out from the witness. I want to introduce it in evidence at this time.

The Court: You want it made clear to the Court.

Mr. Upton: And to counsel for Mr. Volpe, I might add.

The Clerk: Defendant Volpe's Exhibit 1 admitted in evidence.

Defendant Volpe's Exhibit Number 1

The exhibit referred to, previously marked for identification, was admitted in evidence.

[107] Q. In addition to the legal opinions what other documents are required to be submitted to the Bureau of Public Roads by the Road Commission? A. Section 35 of

the 1968 Highway Act requires some assurances. We requested them of the state September 3; 1968 by letter. We have the state's letter of September 5th providing those assurances.

The Court: Could you transpose Section 35 into the U. S. Code Annotated for me?

The Witness: I don't believe I could.

Mr. Upton: I don't think this witness can and I don't think I can, your Honor.

The Court: Somebody has got to.

Mr. Upton: 23 U.S.C. Section 141, I have been advised.

Q. Do you have copies of those documents? A. Those are already out of here. I assume they were entered.

The Court: Does that have any bearing on this at all, on our problem here, or am I reading the wrong section—Real Property Acquisition Policies.

The Witness: Yes, sir, it is; three statements required there.

The Court: I don't think even these gentlemen [108] challenge that part of it. Is that correct?

Mr. Davidson: That's not relevant to the issues before us.

Q. Were any other assurances required by the Road Commission? A. Paragraph 5a assurances of the IM were required and have been submitted.

Q. Do you have those documents or have they been introduced in evidence up to this point? Some assurances have been. I don't know whether these have been or not. A. I believe they have.

The Court: That's 5a; 5a(1), (2), (3), (4) and (5). Is that right? Is that what you are talking about?

The Witness: Yes, sir, 5a(1), (2), (3), (4) and (5), yes, sir.

The Court: Are the questions being asked and answers being given in regard to both—you refer to the statutory sections as well as the IM 80-1-68—in regard to the two parts of the projects or the parts of the two projects with which we are concerned here?

Mr. Upton: I'm not sure I understand the Court's question.

The Court: What I am asking is are the questions being asked and answers given in the context of the projects, [109] of the particular area in controversy here?

Mr. Upton: In regard to the statewide program of the State Road Commission, your Honor. In other words, these assurances were asked in response to this memorandum for the entire State of West Virginia, not for the Triangle area.

The Court: As I understand from his answer, he indicated many of the requirements of 80-1-68 were not applicable to these particular projects because these projects had already been approved long prior to the amendment of April 23. Am I correct in that?

Mr. Upton: August 23, 1968, your Honor. Yes, that's correct.

The Court: In giving that answer did you mean to indicate that, for instance, the requirements of 5a of this 80-1-68 were not required in regard to these particular projects?

The Witness: That's right. If the state had elected not to send in any assurance on those projects, I

would assume that paragraph 5b would allow them not to.

The Court: Did they in fact send in such assurances on these two projects.

The Witness: No, sir; these assurances are given on a statewide basis. These are assurances on a statewide basis.

[110] The Court: Go ahead, Mr. Upton. Then if you want to explain it on redirect you may, Mr. Davidson.

Q. Mr. Saunders, were any other documents submitted in regard to the implementation of this Memorandum 80-1-68 and its amendments? A. Paragraph 8c of IM 80-1-68 requires that the state amend their fixed payment schedules. This was submitted.

Q. Do you have a copy of that document?

The Court: Maybe I am wrong but that again deals with an area in which there is no relevance as to our particular controversy. Is that correct?

Mr. Davidson: It seems to be.

The Court: This deals, Mr. Davidson, as I understand it, with the expenses attendant under the '68 Act and I think you don't challenge that, that you are challenging the capacity for relocation and the capacity for assistance and whether or not the full impact of the '68 law applies to these two areas.

Mr. Davidson: That's correct, your Honor.

The Court: He has indicated they are applying moving costs to everyone now, even those projects. He has already indicated that everybody gets their $100 and $200 and all that.

Mr. Upton: I take it counsel for the plaintiffs [111] are willing to stipulate or admit at this point that the only issue here concerns relocation assistance on these two projects as far as IM 80-1-68 is concerned.

The Court: They might not be willing to stipulate. They might be willing to stipulate so far as the payment aspect is concerned that is not an issue. You would be willing to enter into a negative stipulation as to that?

Mr. Davidson: Yes, we would, your Honor.

Q. Mr. Saunders, excluding those documents that the State Road Commission was required to submit to you in regard to payments, have they submitted any additional documents in implementation of 80-1-68? A. Yes, sir. They have submitted what we refer to as an interim operating procedure. This is a submission from the state to us wherein they essentially state that they will do these things. This IM is an interim procedure. We require interim state operating procedures. This is one thing that's required.

Q. Do you have a copy of that document?

Mr. Upton: Your Honor, I hate to continue to dwell on this.

The Court: The reason for my expression was everything has initials and I was trying to figure out what you call IOPS.

[112] Mr. Upton: I would like to have this marked for identification as Defendant Volpe's Exhibit Number 2.

The Clerk: Defendant Volpe's Exhibit Number 2 marked for identification.

Defendant Volpe's Exhibit Number 2 for Identification

The paper referred to was marked as indicated above.

Q. I hand you, Mr. Saunders, Defendant Volpe's Exhibit Number 2 marked for identification and ask you if you will identify that first and explain briefly to the Court what it is. A. This includes the state's letter of December 20 wherein they set forth their interim operating procedures, various memoranda to the regional and Washington office and our letter back to the state of January 27 where we gave conditional approval to the procedures subject to three minor changes when they develop their ultimate final procedures.

Mr. Upton: May those be admitted, your Honor?

The Court: This was responsive to what, Mr. Saunders?

The Witness: This is required by 11c of IM 80-1-68, page 15.

Mr. Davidson: Your Honor, it appears to me that deals with payments as well.

The Witness: There is another reference to it there. There are two references; page 4c.

[113] The Court: I see; the designation or identification of the office to implement this program, the relocation program.

The Witness: Yes, sir.

Mr. Upton: I move the admission of that.

Mr. Davidson: May I just look at it?

Mr. Upton: Yes, sir. (Handing the exhibit to counsel)

Q. What other documents, Mr. Saunders, has the State Road Commission submitted to the Bureau of Public Roads in the way of implementing IM 80-1-68? A. They submit-

ted their brochure, the relocation assistance brochure, required by paragraph 12c of IM 80-1-68.

Q. Do you have a copy of that brochure? A. I have a copy of it in my briefcase.

Mr. Upton: Your Honor, was Number 2 admitted in evidence? This had to do with the statewide—

The Court: I must confess I don't know, but if it wasn't we will admit it. I take it there is no objection to it.

Mr. Preiser: Your Honor, I think the copy that I gave to Mr. Upton has got some writing on it.

The Witness: I have one in my briefcase there.

The Court: Is the writing prejudicial?

Mr. Preiser: No, your Honor.

[114] The Clerk: Defendant Volpe's Exhibit Number 3 marked for identification; Defendant Volpe's Exhibit Number 2 admitted.

Defendant Volpe's Exhibit Number 3 for Identification

The paper referred to was marked as indicated above.

Defendant Volpe's Exhibit Number 2

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. I hand you Defendant Volpe's Exhibit Number 3 and ask you if that is the document you previously described. A. Yes, sir. This is the state relocation assistance brochure.

Mr. Upton: May that be admitted, your Honor?

The Court: Any objection, gentlemen?

Mr. Davidson: No, your Honor.

Gerald B. Saunders—for Plaintiffs—Cross

The Court: It will be admitted.

The Clerk: Defendant Volpe's Exhibit 3 admitted in evidence.

Defendant Volpe's Exhibit Number 3

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Mr. Saunders, I should have asked you this at the beginning of my examination of you. Would you define in general terms the geographic area encompassed by the two [115] right of way projects which we have been discussing in this lawsuit up to this point?

Mr. Upton: And in that same vein, your Honor, I would request that this map on the blackboard be marked as Defendant Volpe's Exhibit Number 4.

The Court: All right, sir.

Defendant Volpe's Exhibit Number 4 for Identification

The map referred to was marked as indicated above.

The Court: When you speak of the project you are speaking of the project from their standpoint?

Mr. Upton: From a right of way standpoint, that's correct. There may even be a variance, your Honor, between the preliminary engineering project and the geographic area it covers and the right of way project and the demolition project. They may cover—

The Witness: The right of way project we identify as Young Street to Newhouse Branch for I-77-3(66) 100. The I-77-3(67)98 is identified as Jefferson Street to Young Street. There is some decision making as I understand it now going on because there is a little bit of flexibility here. Court Street, for example,

will probably be the actual break point rather than Young Street.

Q. As I understand it, if this is correct, Mr. Saunders, the preliminary engineering project numbers and the project [116] itself now breaks at Court Street. Is that correct? A. I can't answer that.

Q. Your right of way project breaks at Young Street. A. Right. On the plan sheets, on the plan title sheets this is where it is shown breaking. However, it appears that there will be some alteration and it will ultimately be Court Street.

Q. As I understand your testimony up to this point for the two projects you have just defined the State Road Commission has not provided you with a relocation plan for these two projects. Is that correct? A. Yes, sir, that's correct.

Q. Does the State Road Commission in fact have a relocation plan for the Triangle area and not for the balance of these projects? A. I understand that they have a relocation plan for the Triangle area.

Q. Have you ever had occasion to review that plan? A. No, sir. I have not had occasion to review it in any depth.

Q. Have you seen the plan? A. I have seen it. That's about all.

Q. During your testimony on direct examination you indicated that you had recommended certain action in regard [117] to the assurances and so forth provided by the State Road Commission and during the course of answering that question or series of questions you indicated that you had reviewed relocation activities of the State Road Commission. Without going through what you have testified to previously, is there anything additional you have done in

an effort to review relocation on the broad base of the entire State of West Virginia? A, I think I mentioned we have in the past reviewed some 512 cases on probably fifty projects more or less. We generally found the relocation aspects to be completely adequate in all respects. We reviewed—on the two projects in question we reviewed a combined total of approximately 125 relocations and were satisfied with those.

All of these were under the old 1962 Act and did not come over into the 1968 provisions. We knew that from my detailed reviews made shortly after I arrived in West Virginia oriented toward relocation assistance based on the requirements in effect at that time we were satisfied that the State Road Commission—or I was anyway—satisfied that the State Road Commission was providing all that was required and probably then some if you were to compare it nationwide.

The 1968 Highway Act came out, amplified by IM 80-1-68. It was dated September 5th. We received it [118] September 16th. September 15 I was at a meeting at Jacksons Mills, West Virginia, called by the State Road Commission wherein they were implementing and getting their people ready to go with the new provisions, were they successful in getting the legal authority to do it.

We didn't even transmit the final IM in its present form to the State Road Commission until September 20th, 1968. There are a number of things that led me to recommend to my Division Engineer that the State Road Commission of West Virginia was ready to go with the provisions.

We maintained, myself personally, and the three people who work in my office maintained close contact with the state central office relocation personnel who work under Mr. Colan. We felt like they knew everything that was ex-

pected of them both under the old procedures and while we were growing, everybody growing into the new procedures. They were aggressive. They developed the plans for this meeting. They put on this meeting and invited the Washington office people along with people from my office. We got a great deal out of that ourselves, I might add.

Q. Mr. Saunders, isn't it true that since you have been in the position you are now and from your reading of your files in your office of your predecessor that the State Road Commission has continually beeun audited by the Bureau of Public [119] Roads in regard to right of way purchases and acquisitions and relocations? A. Yes, sir. That's the whole purpose of this. This is just a summary of what we have done towards auditing, just relocation assistance.

Q. And that is a continuing process. A. Yes, sir, it is a continuing day to day process, routine.

Q. Mr. Saunders, I don't want to create the impression here that you have never been critical of the State Road Commission. Is that correct? A. I have been critical of the State Road Commission.

Q. And how have they responded to criticism? A. As well as anybody could as far as I am concerned. Our area of criticism for the most part centered around lack of documentation. There is a magnitude of records that's required to be filled out.

When I first came here this was probably the one area that we felt like had to be straightened out a little bit, at least to satisfy me. They were not what I consider serious. Some of the things that were involved were things like a relocation caseworkers not logging in on a form the type of contact that he may have made and then you cross check the file and find out from other sources that he was there on that [120] day.

It was strictly a matter of documentation and maintenance of the detailed records that's required by the IM in effect prior to the 1968 Highway Act and are still included in the 1968 Highway Act; so any criticism that I had or any of my people had towards the state's relocation efforts generally boiled down to this area when it cleared everything away.

Q. In other words, an area of documentation? A. Right. This was primarily it. I don't think we have ever had occasion to take an exception of federal aid funds for relocation assistance. I know we have questioned them a couple of times formally on documentation again, but at no time did we feel like they had committed such a serious breach as to necessitate withholding or my recommending to my Division Engineer that we withhold federal aid funds.

Q. Isn't it true, Mr. Saunders, based upon your experience other places than here in West Virginia that you and the Bureau consider the State of West Virginia's Right of Way Department a very progressive department? A. I personally consider it in total as a very progressive right of way department. I think their relocation section is particularly aggressive.

Q. And it is based upon these experiences of yours and other experiences you have had with the State Road Commission [121] which led to the assurances and the legal opinions and so forth? A. Yes, sir.

Mr. Davidson: Your Honor, I think this is not very helpful. Counsel is beginning to lead the witness.

Mr. Upton: This is cross-examination.

Mr. Davidson: Of your witness.

The Court: I must confess much of it is self-serving. We will let him testify.

Q. Mr. Saunders, for the purpose of edification of the Court and for counsel, I might add, what action would you recommend to your Division Engineer if you received verified complaints similar to those alleged in the complaint in this action to the effect that persons had been forced by the State Road Commission to relocate contrary to IM 80-1-68? A. If the IM 80-1-68 applied to that case, I would immediately go to my Division Engineer and advise him of the situation and recommend that he withhold federal aid funds and take whatever action was appropriate until the situation was corrected.

Q. Have you ever had occasion to do this with the State Road Commission since you have been in West Virginia? A. No, sir, not on a project basis. I have done it on a parcel basis regarding appraisals.

Q. In regard to IM 80-1-68, in regard to relocation [122] under the '62 Act, were you ever required to take this action in the State of West Virginia? A. I don't believe we ever took exception to a single relocation.

Q. Mr. Saunders, I didn't get my note straightened out on your direct testimony. Did you have total displacement figures for each of these two projects, the number of parties to be displaced and the number that have already been displaced in each of these two right of way projects?

The Court: You mean in the Triangle section?

Mr. Upton: No, your Honor; I mean in the two projects.

A. Yes, sir.

Q. Have you previously testified to those figures? A. Yes, I believe I gave them directly to the judge at his request.

Q. I wanted to make sure they were in the record. A. I would be happy to give them again.

Q. Perhaps you had better. I'm not sure they are on. A. On I-77-3(66)100—

Q. These are persons? A. These are people to be relocated; 380. Have relocated 913. These are approximate figures developed through the State Road Commission.

[123] The Court: As of what date?

The Witness: February 28, 1969. On I-77-3(67)98 there remain 496 people to be relocated approximately. They have relocated 401. 401 have already been relocated.

Q. Mr. Saunders, I don't think you have been asked this question yet. In regard to relocation in the Triangle area can you describe just briefly to the Court what the state has done in the way of providing a relocation office and things of this nature, if in fact they have done that? A. Well, the State Road Commission has the same provisions required on any project working in the Triangle, one of which is the relocation field office which is convenient to it. I have the exact address here some place, but they do have a relocation field office conveniently available.

It is open five days a week and one evening a week for the needs of the people living in that area. They have here listings of all available property for rent and for sale that they know of. They get this information from the multiple listing service here in Charleston. They have that.

They have information from the newspaper. They have the information from the VA government priority housing if they have any in Charleston; also FHA, same type of arrangement. They have people on their staff who have

certain contacts with apartment managers or owners.

[124] They have been in contact with the public housing authorities. They update these things periodically, keep updating them. If one becomes occupied I am sure that they take that one out as no longer being available.

They have their state equipment, I assume, available to take anyone around to see any of this replacement property that don't have their own or a way to get there. It is hard to describe the relocation aspects generally because each case is almost an individual situation. They do anything that they can to get the people relocated.

Q. This has been your personal observation and study? A. Yes, sir, this has been my personal observation.

I would add one thing about the IM 80-1-68 and the law. The state is the only state in the country that has the authority to make relocation payments or implement the entire IM in the manner that West Virginia does.

Their procedure, they did not—at the time they were developing their procedures back in October and November they didn't have enabling state legislation. Their first legal opinion as I remember essentially said, "Okay, we will act as your agents. You give us the money and we will go give it to the people."

This was based on a clause in the original draft IM that was subsequently removed before the final issuance of the [125] IM. They then issued a negative opinion to the effect that they couldn't, and Washington came up with a scheme where administratively this thing might be administered. We advised the state, "Can you provide it this way?"

They issued a legal opinion to the effect that they could provide these relocation services and payments set out in IM 80-1-68 in this manner. It requires a detailed review

by myself and my people and my superior of each claim until such time as they have enabling state legislation, which puts it back in the same perspective as the old '62 Highway Act.

Q. As I understand your testimony, West Virginia is the only state without enabling legislation permitted to do this by the Bureau of Public Roads. A. As of March 26th this is true. In fact, I understand—I can't from my own personal knowledge know—that West Virginia procedure has actually been given that name and they are sending it around to some of the other states. There are two states that have this procedure in Washington now under review based on West Virginia procedures that they and this office developed.

Mr. Upton: I think that's all.

Cross-Examination by Mr. Preiser:

Q. Mr. Saunders, unless my hearing is bad, and [126] sometimes it gets that way in this courtroom, I thought Mr. Upton asked you if West Virginia wasn't the only state that did not have the enabling legislation. It is reversed, isn't it? West Virginia is one of the states that has it and has the model plan. Is that correct? A. Yes. It is based on an administrative arrangement, yes, sir.

Q. As a matter of fact, the West Virginia State Road Commission's relocation procedures are being arranged and published and printed and courses are being taught around the country to follow this plan that we are using here. Is that correct, sir? A. Yes, sir. I have something here with me on that line, yes, sir.

Q. Even though the State Road Commission does not have to comply with 7b of 80-1-68 by virtue of the Circular

Memorandum of the Federal Government February 12, '69, as I understood in response to one of Mr. Upton's questions, you say you have seen the plan even though one is not required? A. I have seen it. I have not examined it.

Q. I hand you this document here. Is that the plan that you have seen, sir?

The Court: Is this for the Triangle section?
Mr. Preiser: Yes, your Honor.

[127] A. Sir, it appears to be similar. Yes, sir, it appears to be similar, at least, to the one I saw; very similar.

Q. Are you familiar with the fact, Mr. Saunders, in Charleston, West Virginia the Housing Authority of the City of Charleston has for a number of years and as late as their August 1st, 1968 regulations given priority rating to persons who were displaced due to the building of public roads, such as persons who might be displaced in the Triangle area? A. I understand that such priority treatment is consistent with normal procedures.

Q. And the public housing available in Charleston, West Virginia, I suppose does meet the safe, sanitary, decent—

The Court: I have let you gentlemen have considerable latitude, but I think we have reached the permissive penumbra in this aspect now.

Q. Have you examined and seen the public housing at Lee Terrace, Littlepage Terrace, Orchard Manor? A. Yes, sir, I have seen them. I have not been inside and examined them in detail.

Q. Did I understand in response to some of the questions that Mr. Upton had asked you that some of these things

are not required with regard to this project because the project had been authorized prior to August of 1968, and yet there were [128] compliances and assurances filed that would cover this project and this area, even though not required? A. Yes, sir.

Q. So by way of summary it would be fair to say that the State Road Commission of West Virginia insofar as relocation of displacees is concerned has gone beyond that that they are required to do in your opinion? A. Yes, sir, that's correct.

The Court: Are you going to testify?

Mr. Preiser: I didn't intend to, but I thought I was cross-examining, your Honor. Your Honor may want to know this and that's why I thought I might ask this next thing.

Q. His Honor was asking you about how decisions were made when a person paid $60,000—

The Court: We have winnowed that out.

Mr. Preiser: I would like to show there were qualified appraisers who made those points.

The Court: We don't care because that's one thing we have all agreed on. We are not concerned about the payments.

Mr. Preiser: May I have the plan Mr. Saunders has testified to marked for identification at this time? I don't want to move its entry through this witness. Ritchie and Colan Exhibit 1.

[129] The Court: We will call it Ritchie Exhibit 1.

Gerald B. Saunders—for Plaintiffs—Cross

Defendant Ritchie's Exhibit Number 1 for Identification

The paper referred to was marked as indicated above.

Mr. Davidson: Is Mr. Ritchie going to be called?

The Court: We are just designating it as Ritchie Exhibit 1.

Mr. Davidson: I just wondered if he was going to put it in with Mr. Ritchie.

Mr. Preiser: That's all, your Honor.

The Court: Do you have anything further, Mr. Davidson?

Mr. Davidson: Yes, your Honor. Exhibit 10 was not formally offered. That was our exhibit.

The Court: We will admit it.

The Clerk: Plaintiffs' Exhibit Number 10 admitted.

Plaintiffs' Exhibit Number 10

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Davidson: Secondly, earlier in cross-examination the witness testified as to the number of persons already dislocated and those remaining in the two-project area as of the end of February, also indicated he did not have the information as of August 23, 1969. I would like to request that defendants furnish that information to the Court and [130] serve it on the parties, properly authenticated.

The Court: Can you get a breakdown on that?

The Witness: It would take some doing. I would

have to go to the State Road Commission files and search it out. It would take some doing, yes, sir, to get the exact count that I would want to rely completely and totally on it.

The Court: I will take that under advisement. If I think it is an operative factor we can do that to supplement the record.

Redirect Examination by Mr. Davidson:

Q. Mr. Saunders, you testified that authorizations were given in regard to the two projects under consideration for preliminary engineering work and right of way acquisitions work in 1965 and '66 and some in 1967. A. Yes, sir.

Q. Do you have documents which show that authorization? A. Yes, sir, several documents. If we don't have them I can sure get them for you.

Q. Are they available in the court at this time? A. I gave them—Mr. Upton, I believe these were some of the first things I was getting together for you. They are in the files. I know that.

Mr. Upton: Let me hand these to the witness and [131] ask you if these are what you are looking for.

The Witness: Here is June 1st, 1965 on I-77-3(67) 98. These go in order. There have been six separate authorizations given.

The Court: Gentlemen, let's take a brief recess until you can get yourself organized here.

Mr. Davidson, I notice Mayor Dodson back here. What do you want of him?

Mr. Davidson: Simply the authentication of sev-

eral documents prepared for the City of Charleston, the housing problems. We have them over here. We can show them very quickly.

The Court: Have you discussed them with Mr. Jones, counsel for the Mayor?

Mr. Davidson: Our discussion was with Mr. Preiser, who objected to any authentication.

Mr. Upton: Your Honor, may we inquire as to the materiality of these documents?

The Court: I don't know. I hate to see people sit around in the courtroom all day long. I am sure they have better ways to occupy their time, and if there is something we can get out of the way I think we should.

Mr. Jones: There is only one document. I don't think anyone can authenticate or can offer any—

[132] The Court: What are they, gentlemen?

Mr. Davidson: They are various studies undertaken with federal financing.

The Court: I figured that.

Mr. Davidson: Everything else is. The study, among other things, concerns the housing and relocation problems of the City of Charleston and they do take into account displacement to be caused by the interstate highway through the city. They are prepared by consultants, submitted to the city.

We will through our expert offer them as the basis of his testimony. They are public documents. We want to do something very simply, which is to establish that these are the authentic documents. I imagine at the time they are offered defendants may wish to object to their relevancy, but all we wanted to establish was their authenticity.

The Court: The authenticity that they were in fact reports that resulted from studies made. I am sure there would be no objection on that ground, would there, gentlemen?

Mr. Preiser: We don't know they are. We don't know that they are complete and we don't know where they came from. We don't know they are authentic. That's the question.

The Court: Mayor, we are going to take a brief recess. I am going to ask these gentlemen to let you look at them. If they are authentic and you assure us that, we will [133] have no trouble in dealing with these attorneys.

You may step down.

(Recess taken.)

The Court: All right, Mr. Davidson. How did you get along with the Mayor?

Mr. Davidson: Efforts at negotiation failed. I will finish with Mr. Saunders and call the Mayor.

Mr. Preiser: Your Honor, there are a series of documents, some of which have writing which was not there on the original documents. These gentlemen say they put the writing on. Others are in the process of being revised or updated and/or clarified. Others appear to be incomplete. For that reason we don't feel we can justifiably stipulate their authenticity or their competency.

The Court: All right.

Mr. Davidson: Will you mark this document as Plaintiffs' Exhibit Number 13 for identification?

The Clerk: Plaintiffs' Exhibit Number 13 marked for identification.

Gerald B. Saunders—for Plaintiffs—Redirect

Plaintiffs' Exhibit Number 13 for Identification

The paper referred to was marked as indicated above.

Q. Mr. Saunders, I show you Plaintiffs' Exhibit Number 13 for identification and ask you to examine and identify the document. [134] A. This is a xerox copy of a letter of authorization on Project I-77-3(66)100. Its effective date is January 6th, 1969.

Q. Mr. Saunders, I refer you to the last two sentences, the second of which is underlined in red, and ask you to read that. A. "The 100 percent federal participation is eligible in the above costs"—and we are talking here about relocation advisory assistance, supplemental payments, supplemental incidentals and relocation moving cost—"for any displacements occurring between August 23, 1968 and July 1, 1970. It is further understood you will comply fully with the provisions of IM 80-1-68 as amended."

Q. Is that the document which we have been referring to as Plaintiffs' Exhibit Number 2? A. Sir, I really don't know.

The Court: Yes.

Q. From whom, to whom was that communication? A. From Division Engineer, Mr. Carpenter, to Mr. Hamill, Commissioner at that time, State Road Commission.

Q. I am confused, Mr. Saunders. Has a determination been made that all regulations governing relocation assistance apply to this Project I-77-3(66)100, or has a determination been made that they don't apply? [135] A. They apply to the extent that they can comply and are required to comply.

Gerald B. Saunders—for Plaintiffs—Redirect

Q. The document says they are expected to fully comply. A. Yes, sir. I wrote this document. If there is a mistake made, it is in semantics.

The Court: Let me ask you this. In writing that did you intend to refer only to the reimbursement or the monetary aspect of the relocation?

The Witness: Yes, sir.

The Court: All right.

Mr. Davidson: I offer Plaintiffs' Exhibit 13 into evidence.

The Court: It will be admitted.

The Clerk: Plaintiffs' Exhibit Number 13 admitted.

Plaintiffs' Exhibit Number 13

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Mr. Saunders, have you made any determination in writing that the entire set of regulations governing relocation assistance does not apply?

The Court: You say determination, Mr. Davidson?

Mr. Davidson: Let me strike that.

Q. Have you recorded in writing any determination exempting the West Virginia State Road Commission from full [136] compliance with the procedural memoranda governing relocation assistance? A. If I understand the question, sir, they have through the normal course of routine office function and transmitting correspondence, they have copies of all of the memoranda applicable. My

point is I don't make policy and these memoranda that set out these things originated with our Washington office.

It isn't in that case up to me to make or record that my superiors make a decision on the particular issues in those memoranda. If there is some leeway implied in the memoranda, I can bring this to his attention.

Q. Has anyone in Washington in the Department of Transportation made a determination that the regulations in Plaintiffs' Exhibit Number 2 do not apply to the interstate systems in the City of Charleston? A. To the extent that the clarifying memoranda that came out after IM 80-1-68 apply to your question, such determination has been made.

The Court: Let me ask you this question, Mr. Saunders.

The Witness: Yes, sir.

The Court: If in Washington—and by that I mean at the top level of the Bureau of Public Roads—is that what [137] it would be?

The Witness: Yes, sir.

The Court: If they made a determination that the State Road Commission of West Virginia in its program in the area involved was not living up to all of the requirements, criteria and memoranda of any type whatsoever that had been issued by the Bureau of Public Roads—and by that I mean at the highest level—would they or would they not merely cut off the funds for the project?

The Witness: I can't answer that question directly. I am sure that they do have the authority to do this. They would probably instruct the Regional Federal Highway Administrator of the situation which led them to believe that this was needed, to cut off the funds.

He would in turn—the Regional Federal Highway Administrator would then advise my superior, Mr. Carpenter, the Division Engineer, and he would on the basis of that cut off the funds.

The Court: That's the control that they exercise on this project, along with numerous others?

The Witness: This is correct, sir.

Q. Mr. Saunders, you testified in the project we have called Project B that of the 801 persons to be displaced 400 remained in their residences as of the end of February 1969. [138] Is that correct? A. That's (67); to be relocated, approximately 496.

Q. To be relocated? A. Yes, sir.

Q. Out of a total number of how many? A. Out of a total number of approximately 897.

Q. Do you consider that a substantial number of persons yet to be relocated? A. Yes. I would consider it a significant number, yes.

Q. The letter to which you referred, which is the first page of Plaintiffs' Exhibit Number 3, memorandum from J. A. Swanson on February 12th, 1969—I can show this to you—states, and I quote, "If a major portion of the relocations have previously been accomplished very little good would result from going through the conceptual stage study. However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b." A. Are you talking now in relationship to the authorization letter that you had me read?

Q. I am asking if a substantial number of persons are yet to be displaced in the project which we have been calling

Project B, does not this communication require that the [139] analysis of the available relocation housing required by 7b of the regulations be applied? A. No, sir. I think I might be able to clarify it for you.

Q. Yes, please. A. It's in the CM. "It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any additional authorizations to acquire right of way." We have not issued any additional authorizations to acquire right of way. Also in that same paragraph, last sentence—

> The Court: Where are you? What page?
>
> The Witness: I am in the Circular Memorandum of February 12th. The last sentence in that paragraph says, "Some variation may be permitted by the division engineer when the circumstances warrant."

Q. Has the Department of Transportation established complaint procedures to receive and act upon grievances of a failure to relocate adequately? A. Has the Department of Transportation?

Q. Yes. A. I don't know of any such procedures. There are certain procedures that anyone who has a complaint about can follow: write your Congressman, it comes to us; write the [140] President, it comes to us, the Department of Transportation. The Department of Transportation to my knowledge does not have an office which handles complaints under IM 80-1-68.

Q. There is no administrative procedure? A. Not that I personally know of.

> Mr. Davidson: Thank you very much.
>
> The Court: Is that all, gentlemen?

Recross Examination by Mr. Upton:

Q. Mr. Saunders, I don't think this is quite clear yet in the record. A. I didn't understand you, sir.

Q. I say, I don't think it is quite clear yet in the record the mechanical process that we have been discussing here in regard to the Bureau of Public Roads' authorization given to the State Road Commission to permit them to acquire right of way. Will you explain that to the Court? A. The process that leads up to a letter of authorization?

Q. Not necessarily that. What does a letter of authorization mean to the State Road Commission? A. It is their authority to proceed with the work set forth in the letter of authorization.

Q. In other words, prior to this time they have advised [141] you where they intend in general terms to purchase right of way. Is that correct? A. Yes, sir. We have submitted at the time with the state's request to acquire right of way—we either have submitted or have had previously submitted right of way plans. I assume this is what you are talking about.

Q. Then when you give them authorization to acquire right of way you are giving them authorization to expend federal government money. Is that correct, or to apply for money from the federal government? A. Yes, sir. That authorization gives them the right to proceed with the character of work outlined in the letter, and if they follow the requirements they will get their money.

Q. The point being the federal government does not follow the State Road Commission around and authorize the purchase of individual tracts. Is that correct? A. No, sir. As I tried to point out earlier in the testimony, the State Road Commission has 200 right of way people. I have four. The whole concept is that the state assures not just the re-

location assistance but the whole ball of wax, everything involving right of way, that they will do things in a certain manner.

They will make appraisals this way. They will do this this way. They will negotiate in such a way. They will [142] dispose of property this way. They provide these assurances in what we commonly refer to as the state's thirty-five point submission. This thirty-five point submission is a brief analysis of how they operate. It has to be approved, I believe, by the Director of the Bureau of Public Roads in Washington. Once the state has approval on that particular document they can proceed and this sets up the whole reaction where we at that point operate on a spot check basis.

If they go out and purchase parcel ten on a project anywhere in the state, we don't have to go out and check behind them to see that they did that. Our review of the state is on a spot check basis only. We strive, for example, to review five percent of appraisals, attempting to get that five percent that will cover the greatest amount of federal money; the high priced parcels, in other words.

Q. Can you again tell me the last date that the Bureau of Public Roads gave authorization for the purchase of right of way in (66)? That's I-77-3(66)100.

The Court: Isn't that in the record, gentlemen?

Mr. Upton: I believe it is, your Honor.

The Court: I thought it was.

A. According to my notes, on (66) you said?

Q. That's right. A. Which came from these authorizations. The last [143] letter, we authorized the state to acquire right of way four separate times. We authorized

them first April 19th, 1966 to acquire right of way. We authorized them September 22, 1966 to acquire right of way. We authorized them January 27th, 1967 to acquire right of way. We authorized them—and this is the last one—to acquire right of way May 23, 1967.

The Court: Would your successive letters be for different segments of this particular project?

The Witness: No, sir; I can't say exactly how it applies here but our normal procedure is once they establish the boundaries of the right of way limits there are certain parcels that clearly fall within it. We call these whole takes.

The line can still be bounced around a little bit. The ones that fall clearly within the right of way, if the state requests whole takes we will authorize whole takes only. We can give a segment authorization; we can give a parcel by parcel authorization. We are unlimited how we can give authorizations on these matters.

The Court: But once you write a letter on the whole take authorization, the particular corridor in which you are interested at that time is pretty well set, would have to be.

The Witness: Yes, sir. When they request whole [144] takes they know that those parcels will be taken.

The Court: That they will definitely fall within the proposed corridor?

The Witness: Yes, and there is no problem on their part of losing federal funds because they acquire too much and we come back later and cite them because they took too much after the line is finalized.

Q. After May '66 did that conclude all the authorizations necessary, let's say whole takes, first in regard to I-77-3 (66)100? A. To the best of my knowledge it is the last authorization to acquire right of way that we will have to issue the state. To the best of my knowledge.

Q. Can you give me that same date, same circumstances in regard to I-77-3(67)98? A. According to my records we gave the state authorization to acquire right of way November 30th, 1966 and we have not issued any more letters of authorization to acquire, and I assume that that authorization encompasses the whole project.

In other words, it is conceivable that there will be no more letters of authorization and I think partly the reason for this is early in '67, I know when I first came here they were giving these parcel by parcel authorizations. This [145] is no good and we changed from that and we are now going on what we call station to station, which includes the whole project.

Q. What was the date of that? A. November 30th, 1966.

Q. After those two dates as far as right of way taking was concerned in these two projects, authorization of money, we were out of the business? A. As far as authorizing the state to acquire right of way, yes, sir.

Q. And from there on out it was the State Road Commission's problem to acquire the right of way with their authorization to expend government money? A. Yes, sir.

Mr. Upton: That's all.

Mr. Preiser: So there will be no mistake about it, do I understand—correct me if I am wrong—that there are no persons that remain now to be relocated within the two projects in question or within the area in question that have to be relocated because of

an additional authorization issued after August 23 of 1968 for additional right of way? Is that correct?

The Witness: To the best of my knowledge and belief this is correct.

[146] Mr. Preiser: Thank you, sir; that's all.

The Court: All right. You may step down, sir.

(The witness was excused.)

The Court: Let's get the Mayor up here.

The Clerk: State your name.

The Witness: Elmer H. Dodson.

ELMER H. DODSON called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Boettner:

Q. For the record, state your name, please. A. Elmer H. Dodson.

Q. And again for the record, do you hold any official title in the City of Charleston? A. I am Mayor of the City of Charleston.

Q. How long have you been Mayor? A. Since May 1, 1967.

Mr. Boettner: Can we identify this?

The Court: Identify all of them you want to ask about, Mr. Boettner.

The Clerk: Plaintiffs' Exhibit Number 14 marked for identification.

[147] *Plaintiffs' Exhibit Number 14 for Identification*

The paper referred to was marked as indicated above.

Q. I am handing you Plaintiffs' Exhibit Number 14.

The Court: Mr. Boettner, I think it would be probably helpful if you would just indicate what the exhibit purports to be and ask the Mayor whether that is what it is or not.

Q. This purports to be the Community Renewal Program final draft report prepared for the City of Charleston, West Virginia. It was prepared for the Municipal Planning Commission by Marcou, O'Leary and Associates, planning and development consultants, Washington, D. C., and this is the final draft report, April 1968. Is that correct? A. There was a final draft report of the Community Renewal Program dated April 1968 that was presented to the city, yes, sir.

Q. Has there been a report of this nature subsequent to this? A. This report, whatever the report was that was presented, there has not been a later report. I am advised that the original report is in the process of being revised because of changes that have been made in certain things, but there has not been a later report.

Q. Could the city produce a copy of these latest [148] revisions if the Court so requested at this time? A. I presume they could.

Q. In your examination, Mayor Dodson, does that appear to be an authentic copy of the comprehensive renewal plan final draft report, April 1968? A. Very frankly I can't say. The frontice page appears to be the same as the frontice page that was on the report and it is approximately the same size.

The Court: Does it weigh about the same?

The Witness: It weighs just about the same.

Q. Could we trouble you to leaf through it? A. I have been briefed on the report. I am not prepared to say that this report in detail is the same report. I am not prepared to say that it isn't either.

The Court: Mr. Boettner, do you tender it as an authentic copy of the report?

Mr. Boettner: Yes, your Honor.

The Court: All you have to do is question the Mayor on the background of it. The Court is willing to accept your assurance as to the authenticity of it.

Q. Mayor Dodson, could you state the background leading up to this report? A. This report was made in response to a contract entered into between the city, the federal government and [149] Marcou, O'Leary and Associates. I am not certain of the date but I believe it was sometime probably in 1966 that the contract was entered into, and the purpose of the contract was to, among other things, end up with a Community Renewal Program and a report, which is this or something similar, was prepared and presented to the City Planning Commission and to the city. It has not been officially adopted at this time.

The Court: You have indicated there may be some revisions in the making, Mayor.

The Witness: Yes, sir.

Mr. Boettner: Anything further, your Honor?

The Court: I think that's sufficient for my purposes.

Mr. Boettner: We move for its submission into evidence.

The Court: I am going to permit it to come in, gentlemen.

Elmer H. Dodson—for Plaintiffs—Direct

Mr. Upton: For all purposes, your Honor? Do we not have the right to object to the materiality?

The Court: I am merely letting it in as to the authenticity and what it purports to be in the light of what the Mayor says. I know you gentlemen will object to it on other grounds.

The Clerk: Plaintiffs' Exhibit Number 14 admitted.

[150] *Plaintiffs' Exhibit Number 14*

The exhibit referred to, previously marked for identification, was admitted in evidence.

The Clerk: Plaintiffs' Exhibit Number 15 marked for identification.

Plaintiffs' Exhibit Number 15
for Identification

The paper referred to was marked as indicated above.

Q. Mayor Dodson, I am showing you a Housing Investigation Report that is dated January 6, 1969 and it is addressed to members of Council. Does that appear to be an authentic reproduction? A. Sir, I examined this—

Mr. Preiser: Your Honor, first of all find out if it is a complete report, a complete thing that it purports to be.

The Court: I am sure the Mayor will be able to take care of himself on that.

Q. Perhaps it would be more expeditious, Mayor, to provide the Court with the background leading up to the

direction of this Housing Investigation Report and explain by whom it was done. A. This appears to be a report to the City Council by Councilmen Silverstein and Smith in response to a directive of Council relative to investigation of certain matters relating [151] to housing within the city. My brief examination during the recess would indicated that this—as near as I can remember this is the report with the exception of the transcript of testimony which is referred to in here but does not appear to be here.

Q. Is that transcript presently filed with the city? A. There is a copy on file with the City Clerk.

Q. If the Court so requests, we could produce that? A. Yes, sir.

Mr. Boettner: I move for the admission.

The Court: All right.

The Clerk: Plaintiffs' Exhibit Number 15 admitted and Plaintiffs' Exhibits 16 and 17 marked for identification.

Plaintiffs' Exhibit Number 15

The exhibit referred to, previously marked for identification, was admitted in evidence.

Plaintiffs' Exhibit 16 and 17 for Identification

The papers referred to were marked as indicated above.

Mr. Preiser: Your Honor, let the record show our objection on the ground of incompleteness, as well as this is something that happened in January of '69,

subsequent to the date of their suit and the filing of their complaint.

The Court: Your objection is on the record. It [152] will be admitted.

Q. Mayor Dodson, I am showing you the recommended Comprehensive Plan final report draft.

The Court: What exhibit number?

Mr. Boettner: Plaintiffs' Exhibit Number 17.

Q. Recommended Comprehensive Plan final report draft as prepared October 1967, revised October 1968, prepared for the City of Charleston, West Virginia and by the Municipal Planning Commission, again by Marcou, O'Leary and Associates. Again would you identify this as being correct? A. This appears to be about the same as the Comprehensive Plan that was prepared pursuant generally to this same contract that I mentioned between the city and Marcou, O'Leary and Associates.

I noticed as I leafed through it very briefly during the recess that there appeared to be a number of interlineations of written matters which Mr. Wilding, the City Planning Director, advises were not in the final report itself. There was a final report and the final report of the Comprehensive Plan was adopted by the City Council. It would appear that this looks like it is about the same thing, yes, sir.

The Court: Mayor, would this appear to be, absent the interlineations and what not, the same report that was adopted by Council?

[153] The Witness: It looks very similar to it, yes.

Q. Mayor Dodson, could you again explain to the Court the general background of this study and the reason why it was undertaken? A. The background is similar to the explanation of the Community Renewal Program. I don't recall whether there was one contract or two contracts, and a part of the program of the State of West Virginia was involved. It was practically all federal funds and was prepared generally about the same period as the Community Renewal Program.

Q. Then this is required by the Housing and Urban Development for the submission of an Urban Renewal Program to get their approval? A. Yes. This is one of their many requirements, yes, sir.

Mr. Boettner: The plaintiffs move the admission into evidence of Plaintiffs' Exhibit Number 17.

The Court: Do I hear an objection, gentlemen?

Mr. Upton: Yes, your Honor, for the purpose of the record the general objection and specifically on this one, the interlineations.

The Court: It will be admitted.

The Clerk: Plaintiffs' Exhibit Number 17 admitted.

[154] *Plaintiffs' Exhibit Number 17*

The exhibit referred to, previously marked for identification, was admitted in evidence.

The Court: Mayor, do you refer to it as the Community Renewal Program?

The Witness: Yes. This was the first one.

The Court: What does that deal with? Does that deal with the entire city?

The Witness: Yes, sir. Both of these deal with the whole city.

The Court: The whole city?

The Witness: Yes, sir.

The Court: All right, sir.

Q. Mayor Dodson, I am showing you Plaintiffs' Exhibit Number 16, which is an excerpt from the Housing Dimensions of the Charleston Community Renewal Program. This was prepared for the Municipal Planning Commission of Charleston by Hammer, Greene and Silver Associates. This is dated November 1967. Does this appear to be an authentic excerpt from that report? A. Mr. Boettner, I know that a report was prepared by Hammer, Greene, Silver and Associates entitled Housing Dimensions of the Charleston Community Renewal Program.

Q. Could you explain to the Court the background of that? [155] A. It was part of the program that I first mentioned when I spoke of the Community Renewal Program. These people are economists, as I understand it. I have never read this report. I have been briefed on it. This was never presented to City Council except by reference. I know the report was prepared about this time and it was about this size.

Q. You recognize it as being the Hammer, Greene report prepared by the Municipal Planning Commission? A. I can't say I recognize this as the report but I do know that a report was prepared and presented in conjunction with the Community Renewal Program report.

Mr. Boettner: The plaintiffs move for the admission of Number 16 into evidence.

The Court: With your personal assurance, Mr. Boettner, that it is a copy of the report.

Mr. Boettner: Yes, sir.

The Clerk: Plaintiffs' Exhibit Number 16 admitted.

Plaintiffs' Exhibit Number 16

The exhibit referred to, previousy marked for identification, was admitted in evidence.

Mr. Boettner: Please identify this as Plaintiffs' Exhibit Number 18.

The Clerk: Plaintiff's Exhibit Number 18 marked for identification.

[156] *Plaintiffs' Exhibit Number 18 for Identification*

The paper referred to was marked as indicated above.

Mr. Boettner: Your Honor, may I ask the Court's solicitude on this? This is a copy of a letter, the typing of which has severely deteriorated because of many copyings. We have offered the Court a copy for the sake of clarity.

The Court: Stamp them both together.

Q. Mayor Dodson, I am showing you Plaintiffs' Exhibit Number 18, which is a letter addressed to you, Mayor Dodson, in your official capacity as Mayor of the City of Charleston. This letter is from the Department of Housing and Urban Development, Widener Building, Philadelphia, Pennsylvania. Would you examine it and identify that as being a true copy? A. This appears to be a copy of a letter which I received in March of 1968. This appears to be a copy of a letter which I received from Mr. Hawthorn.

Mr. Boettner: I move for introduction into evidence of Plaintiffs' Exhibit Number 18.

Mr. Preiser: Your Honor, unless this is an official record, it is clearly hearsay. I don't know what they are putting this in for. I haven't seen it.

The Court: You will find out, Mr. Preiser. Be patient.

(The exhibit was handed to Mr. Preiser.)

[157] Mr. Preiser: Your Honor, this doesn't say who prepared it. It appears to be somebody's typewritten copy of another copy, without a signature, of a letter. It contains statements, just for example, that someone complained to somebody that the state's program wasn't adequate, this type of information. We don't think that's proper to be a part of this record.

The Court: The only reason I am letting these gentlemen inquire from the Mayor about these things is merely as to the authenticity of these things. I don't know whether they are relevant or admissible at all on other grounds and he is merely identifying them.

As a matter of fact, I probably was in error in admitting them in evidence, but it makes no difference anyway. We are trying this case to the Court and I will consider the evidence I consider admissible and I won't consider that I consider inadmissible, and that was the only purpose of it so that's all right.

You tender it, Mr. Boettner, and we will admit it all.

Mr. Boettner: I can assure your Honor that it will become relevant later.

Elmer H. Dodson—for Plaintiffs—Cross

The Court: You don't have to give me that assurance right now.

[158] The Clerk: Plaintiffs' Exhibit Number 18 admitted.

Plaintiffs' Exhibit Number 18

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Boettner: That's all.

The Court: Any questions, gentlemen, of Mayor Dodson?

Cross-Examination by Mr. Preiser:

Q. Mayor Dodson, are you familiar with the admission and occupancy policies as printed by the Housing Authority of the City of Charleston? A. I am generally familiar with them, Mr. Preiser. I have seen them and heard them discussed.

Q. Are you familiar with the priority ratings that are given to citizens who apply for housing with the Housing Authority?. That is, in the public housing available in this area. A. I know there are priorities.

Q. I would like to show you a book, printed on the front of it the Housing Authority of the City of Charleston. Turning specifically to page 11 of 21 pages headed Section IV, Selection of Tenants, see priority rating,. and I note there are five priority ratings. There are one, two, three, four, [159] and the fifth is the public road displacees. Is that correct? A. Yes, sir.

Q. What is the first one?

The Court: Won't this speak for itself? Do we have to take the Mayor's time?

Mr. Preiser: I wanted to show as a practical matter we are first because the other four are inapplicable to the Triangle district.

The Court: Then again it would speak for itself. This was adopted by the Housing Authority, as I understand it, not by Mayor Dodson.

Mr. Preiser: Let me ask it this way, your Honor.

Q. The policies therein contained, Mayor, as far as you are concerned and within your knowledge is there any plan to change that policy so far as priority rating is concerned and insofar as it affects the tenants moving from the Triangle district?

Mr. Boettner: Your Honor, Mr. Mozena, who is the Director of the Housing Authority, is here present in the courtroom. He is the new Director of Public Housing. I am sure he would be in a much better position to testify.

Mr. Preiser: I'm not sure of that. I think the Mayor knows the policy.

The Court: You aren't sure of it?

[160] Mr. Preiser: Don't I have a right to ask him?

The Court: You are taking me off the interstate and have gotten me mixed up with HUD and now the Housing Authority.

Mr. Preiser: If he knows, I think he should be permitted to answer.

The Court: The Housing Authority is an independent agency, isn't it, Mayor?

The Witness: Yes, Judge, it is. It is controlled principally by the federal regulations. The members are appointed by the city and we have contractual

agreements and we work very closely together. Their regulations are subject to federal approval and most of their regulations are federal regulations.

The Court: And so far as policy matters I am sure that they would pay you the courtesy of discussing them with you, but in the final analysis they would be adopted by the Authority rather than the Council or the city.

The Witness: That is apparently so.

Mr. Preiser: If they are going to produce Mr. Mozena and in view of your Honor's questions, I will withdraw my question and excuse the Mayor.

The Court: All right, gentlemen, your next witness.

(The witness was executed.)

[161] * * *

[162] Mr. Saxton: Your Honor, we would like to call Mr. Russell Mozena.

The Clerk: Please state your name.

The Witness: Russell C. Mozena.

RUSSELL C. MOZENA called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Saxton:

Q. Will you please state your name? A. Russell C. Mozena.

Q. And your occupation? A. Executive Director of the Charleston Housing Authority.

Q. Mr. Mozena, would you state how many units the Charleston Housing Authority has presently in position of being occupied?

The Court: Just as a matter of curiosity I wonder if you would go into Mr. Mozena's background. You succeeded Mr. Jarrett, didn't you, Mr. Mozena?

The Witness: Yes, sir.

Q. Mr. Mozena, would you please tell us some of your background, some of your qualifications for the position you [163] presently hold? A. I have twenty-one years' experience with the Housing Authority of the City of Wheeling. I started there right after the World War II and have been in housing ever since. I worked in all capacities with them, beginning as a clerk-accountant of the Wheeling Housing Authority and then the Executive Director. I left there January 31st of '69 and came to Charleston February 1st of '69.

The Court: Thank you. Go ahead.

Q. Mr. Mozena, will you tell us how many occupiable units the Charleston Housing Authority presently has within its control? A. We have 934 units.

Q. And how many of those units are presently vacant? A. Our normal turnover, we average about eleven. This is most generally for repair and the process of showing the unit and rerenting the apartment.

The Court: 934, Mr. Mozena, by the different housing locations? What constitutes these?

The Witness: We have—right at the moment we have four locations. We have 100 units of elderly

housing located at Lee Street; we have 170 units located at Littlepage Terrace? we have 360 units located at Orchard Manor and we have 304 units located at Washington Manor.

[164] The Court: Orchard Manor is out on the other side of Littlepage?

The Witness: Out on the hillside, yes, sir.

Q. Mr. Mozena, how many applications do you presently have outstanding for public housing to the Housing Authority which are presently not being filled because of the reason that you are not able to presently process? A. We have approximately 600 right at the moment. We have accumulated up through 1968 approximately 460 some and than 130 I think that we have accumulated since.

The Court: These 600 people, Mr. Mozena, are they people who would meet the criteria that would qualify them if there were housing available?

The Witness: Yes, sir. These applicants qualify for public housing.

The Court: In accordance with their limitations, I take it that the Lee Street project would be a little more restricted than the other because it is confined to the elderly.

The Witness: Yes, sir.

Q. Is it not true, Mr. Mozena, that you have separate statistics for the elderly when you compile your statistics? A. Yes.

The Court: You mean the 600 estimated would be [165] those that would be applying for Orchard Manor, Littlepage Terrace and Washington Manor?

The Witness: Yes, sir. The statistics for the elderly, we have 131 and 41 which we have taken since January '69 for a total of 172.

The Court: And you only have accommodations for 100.

The Witness: Yes, sir.

The Court: And they are full.

The Witness: They are filled and we have 172 waiting.

Q. Mr. Mozena, under normal conditions, not considering any of the priority ratings which exist in your Housing Authority regulations, a person who normally meets the qualifications for public housing in Charleston, how long does he have to wait before he is accommodated after applying, considering the existing backlog that you have? A. Based upon an average turnover between twenty-five and twenty-nine percent per year we could project the number of our applicants to the neighborhood of eighteen months to twenty-four months:

The Court: What accounts for that rate of turnover, Mr. Mozena?

The Witness: We have taken may statistics on those things and have inquired from the folks who have vacated and [166] there is nothing concrete, sir. It is just as much the complaint of the nextdoor neighbor as it is a delinquent renter or the complaint just of a change of location or some basic irritation of that sort.

The Court: How does that rate of turnover compare with your experience in Wheeling and other places?

The Witness: Almost within three to five percentage points, sir, and knowing West Virginia and the other housing authorities this is about the average; about a third, between thirty percent and a third in a lot of cases.

The Court: Go ahead.

Q. Mr. Mozena, relating to the same question, what would be the waiting period for elderly persons qualifying for the Lee Terrace? A. Well, since Lee Terrace is the original project right at the moment it's hard to say, but we are probably averaging in the neighborhood of about two to four a quarter.

The Court: In turnover?

The Witness: Yes, sir.

The Court: You would have a more consistent or constant group up there than you would in the others?

The Witness: Yes, sir. The majority of our vacancies are attributable to death, sir.

Q. Now, sir, do you have any limitations on the size [167] of families you can take within the Charleston Housing Authority according to your regulations? A. Our present policies provide that the maximum number of persons that we can admit is a family of eight in our largest unit, which is a four bedroom unit.

Q. Do you make any exceptions to this policy? A. In the past sixty days that I have been here, yes. Based upon the standard or the problem of the family I will admit some families that exceed that.

Q. Would you expand a little bit more upon the exceptions that you make or the standards you look to make

exceptions? A. If it was detrimental to the welfare or the safety of the applicant, a fire or something of this nature, or they were living in a substandard house that didn't have adequate heat, and we know that our homes are standard dwellings, that we would accept them to move them in. I would not disqualify them because of the occupancy standard.

Q. Without the addition of any new units to the Charleston public housing authority, how long do you think you can continue to make such exceptions in your admissions policy? A. I think each case has to be weighed individually. We do have the authority to permit the larger family but we would basically try to stick to the regulations.

[168] Q. Going into detail more about the priority rating, I would like to present you, Mr. Mozena, with a copy of the admission and occupancy policy of the Housing Authority of the City of Charleston, Charleston, West Virginia, effective date August 1, 1968. Would you please identify that for us? A. Yes, sir. I have no reason to question that this is not the report. This is the report that we use.

The Court: Does it have an exhibit number?

Mr. Saxton: I will give it one now, your Honor. I'm sorry.

The Clerk: Plaintiffs' Exhibit Number 19 marked for identification.

Plaintiffs' Exhibit Number 19
for Identification

The report referred to was marked as indicated above.

Mr. Saxton: Your Honor, may I move this into evidence at the same time since he has identified it?

The Clerk: And admitted.

Russell C. Mozena—for Plaintiffs—Direct

Plaintiffs' Exhibit Number 19

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Mr. Mozena, I hand to you Plaintiffs' Exhibit Number 19 and call to your attention Section IV paragraph C, which is marked priority rating. Would you please give the [169] Court the priority rating in the order of preference? A. Yes, sir. Our regulations are that priority from among eligible applicants is given to displaced families in the following order: (1) displaced by natural disaster; (2) a low-rent housing project; (3) a public slum clearance; (4) redevelopment or renewal project; (5) public roads, bridges, et cetera; (6) enforcement of housing codes; (7) servicemen or servicemen's families, the head of which has been reassigned; (8) other families.

Q. Mr. Mozena, what plans does the Charleston Public Housing Authority presently have in operation to increase the available number of units? A. Our present plan calls for the construction of 100 elderly units located on Central Avenue, 100 non-elderly units located on West Washington in North Charleston, 100 units of non-elderly located at City Park and 200 units which we have a program reservation for to be located in the Triangle area.

In addition to that, sir, we have an authorization for 100 units of leased housing, which is our most recent program. We have 100 of non-elderly units which we have advertised for construction under the turnkey method of proposals. We plan to accept the proposals about the 23d of this month.

Q. Out of all these units you have just described to [170] us, how many of these units are contingent upon the acceptance of a workable program of the City of Charles-

ton? A. All are with the exception of the 100 units of leased housing.

Q. To the best of your knowledge has the workable program for the City of Charleston been approved? A. No, sir, it hasn't.

The Court: Who has been contesting that?

The Witness: I understand the Triangle Improvement Council and others in that area.

The Court: They have been contesting—this same group here have been contesting I take it from reading the papers, vigorously contesting the workability of these various proposals.

The Witness: This is the group that I understand, sir. I have no affiliation with the Urban Renewal Authority of the City of Charleston, but I understand from what I read this is so.

The Court: I guess we read the same papers.

Mr. Saxton: If I might, your Honor, a point of clarification. The people in the Triangle are contesting the proposed Triangle Urban Renewal Project. That is only a small segment of the workable program. I think the workable program has been rejected for other reasons.

[171] The Court: I understand everything is being contested and it seems to be a way of life.

Q. Mr. Mozena, once a workable program would be certified, how much time would be necessary after that point before any of these units could be constructed and ready for occupancy? A. Once the program has been recertified, we require time for drawings and specifications and the beginning of actual construction should take four to six

months. Actual construction would probably take in the neighborhood of ten to twelve, providing there are no snags come along the way.

Q. Is that true for all the units which you have discussed? A. One or two of the projects may be affected by the acquisition of the land. Where these projects are located—

The Court: Mr. Saxton, I realize that some of this from the standpoint of the position you gentlemen take has some materiality and relevancy, but couldn't we hold this aspect of it down to a minimum? You have made your point in this regard. I don't want to hear all of the ills of the Housing Authority that everyone thinks that's plaguing this community. I am interested in getting this case developed and over with.

Mr. Saxton: In that case, your Honor, I think I [172] have made most of the points I would like to make. I think we can rest at this point.

The Court: Any cross?

Mr. Preiser: Yes, your Honor.

Cross-Examination by Mr. Preiser:

Q. Mr. Mozena, on those priority ratings that you read a moment ago, are there any low-rent housing projects being developed now that would affect the priority rating which you read to us in this area? A. No, sir, there would not be.

Q. Are there any public slum clearances in effect now? A. No, sir, not to my best knowledge.

Q. Any redevelopment or renewal projects? A. Not under construction, sir.

Q. Any persons in the area displaced by natural disaster? A. No, sir.

Q. So that it would be fair to conclude that insofar as the priority ratings are concerned, as a practical matter the first priority rating are those persons displaced for building of public roads. A. Yes, sir, and the Housing Authority is accepting the displacees from the highway development.

[173] Q. Within the three, not Lee Street, but Orchard Manor, Washington Manor and Littlepage Terrace, what was the total turnover last year? How many available units? A. At those three projects we had 245 dwelling units vacated, representing about 29.4 percent of our dwelling units.

Q. A person who has a priority rating number one as a practical matter and there are 200 and some available units per year, what happens to this eighteen-month waiting period that they asked you about? How long would they have to wait as a practical matter? A. Well, sir, probably if the displacees were taken in—

Q. Yes, sir; if they qualified, of course. A. If they qualified. The displacees we would move in ahead. We would give them first priority above all other families.

Q. Would that be a period like ninety days or 120 days? Your best estimate. A. We could take care of them within thirty to sixty days, the displacees.

Q. And there are two other qualifications of selecting tenants in your rules just put into effect, Section D: "Persons living or working in Charleston shall have first consideration." That's another priority? A. Yes.

[174] Q. And in E: "There will be no discrimination because of race, color, creed or national origin." A. That's absolutely right, sir.

Mr. Preiser: Your Honor, in order to save time, would your Honor consider taking judicial notice that those units are safe and are kept up, or will they stipulate that?

The Court: I assume that they meet the qualifications.

Mr. Boettner: Would you repeat that?

Mr. Preiser: Would you stipulate that Orehard Manor, Littlepage Terrace and Washington Manor are safe, decent and sanitary housing within the meaning of the Act?

Mr. Boettner: To the best of our knowledge.

Q. What, sir, is the rental range of those units? A. Our minimum rent in our statement of policies is $25.

Q. Is that per month? A. Yes, sir, per month, on net family income, and they run in steps of for every approximate—for every $50 of annual income the Housing Authority takes $12, which represents twenty percent of their income, sir.

Q. So that the rental depends upon the income of the family? A. Yes, sir.

[175] Mr. Preiser: That's all. Thank you, sir.

Mr. Upton: May I ask a couple of questions?

Cross-Examination by Mr. Upton:

Q. Mr. Mozena, have you been working with the Urban Renewal Authority and the others in regard to the workable plan for the City of Charleston? A. Not since I have been here, sir. The workable plan was in its final stages when I arrived here, sir.

Q. You have never had any meetings with the Triangle Improvement Council or others? A. I have only sat in as a listener, sir.

Q. Did the Triangle Improvement Council at these meetings you have attended have their planner with them at that time? A. Their planner, sir?

Q. Yes. A. Who would that be by name?

Q. Mr. Abeles. A. No, sir.

Q. You have not met that gentleman? A. I met him today, sir.

Mr. Upton: Thank you.

The Court: Is that all, gentlemen?

[176] Mr. Saxton: Just two on redirect.

Redirect Examination by Mr. Saxton:

Q. Mr. Mozena, are you aware that there is an Urban Renewal Program being sought in the City of Charleston? A. Yes, sir.

Q. Have you been informed how many people that program might displace? A. Just what I have heard today.

Q. What is that number? A. About 800, I assume.

Q. Would not those people, if that program is approved, have priority over highway displacees?

Mr. Upton: I object, your Honor. It hasn't been approved and I think the record speaks for itself in that regard.

The Court: I expect it would. I doubt if it would be proper to ask this gentleman about that.

Q. Mr. Mozena, the rent for displacees, is that based on a sliding scale? A. Sir?

Russell C. Mozena—for Plaintiffs—Redirect

Q. The rent charged to displacees, is that also on a sliding scale? A. Yes, sir; the same figure, sir.

[177] Mr. Saxton: Thank you. No more questions.

The Court: All right; that's all. You may step down.

(The witness was excused.)

* * * * *

(Recess taken)

Mr. Saxton: Your Honor, at this time we would like to have another exhibit marked for the plaintiffs and also an affidavit and survey. I would like to move the admission of this affidavit and the attached survey into evidence.

The Court: An affidavit?

Mr. Saxton: Yes, your Honor.

The Court: Whose affidavit?

Mr. Saxton: Carol Tillman.

[178] The Court: Who is Carol Tillman?

Mr. Saxton: She works in the Triangle area.

The Court: She is not here?

Mr. Saxton: Yes, she is. I think we could put her on the stand.

The Court: Don't you think that would be appropriate?

Mr. Saxton: I would like to have this marked as Plaintiffs' Exhibit Number 20.

The Court: Delete the affidavit.

The Clerk: Plaintiffs' Exhibit Number 20 marked for identification.

Carolyn Tillman—for Plaintiffs—Direct

Plaintiffs' Exhibit Number 20
for Identification

The paper referred to was marked as indicated above.

Mr. Saxton: We would like to call Carol Tillman at this time, your Honor.

The Court: All right. Swear the witness.

The Clerk: What is your name, please?

The Witness: Carolyn Tillman.

CAROLYN TILLMAN called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Saxton:

[179] Q. So that the reporter can hear you, would you please speak up? Would you please give your name? A. My name is Carolyn Tillman.

Q. Would you tell us your occupation, please? A. I am community organizer for the Triangle district, Charleston.

Q. Where do you work? A. I work in the Community Resource Office.

Q. Which is located where? A. In the Triangle district in Charleston.

The Court: Who is your employer, Miss Tillman?

The Witness: Mr. Preston of the Triangle Improvement Council.

The Court: She is not on the federal payroll?

The Witness: Yes.

Mr. Saxton: Yes, your Honor. She works through the Community Resource Office.

The Witness: It is a branch of OEO.

The Court: I see. I just wanted to see that everybody was in the federal family.

Mr. Saxton: We are still together, your Honor.

The Court: All right.

Q. Miss Tillman, did you conduct a survey of the people [180] who reside within the path of the interstate as it is proposed to go through the Triangle area? A. Yes, along with five other workers.

Q. Would you please give use the names of those five other workers? A. Clinton Black, Deossie Yancey, Mae Lena Hardman, Brook Rogers and Jack Haveman.

Q. In conducting your survey what precautions did you take to insure that you contacted everyone that was within the path of the highway? A. We made repeated visits to the residents who lived in the path of the highway. We went in the day and we went at night to get those who would be working in the day.

Q. Did you keep detailed notes of how you conducted the survey to be sure you got back to residences where you visited when no one was there? A. Yes. Each of us kept a log noting those who we missed and what time we interviewed them.

Q. Did you not use a questionnaire to interview all these people? A. Yes, we used two types of questionnaires. We had one for the businesses in the path and one for the individual families.

Q. Did you ask all the people the same questions from [181] the questionnaire? A. Yes.

Q. Were there any times you received no response to any of the questions in the questionnaire? A. No.

Q. At any time did you change any of the responses of the people? A. No.

Q. You recorded them absolutely accurately as they were given to you. Is that correct? A. Yes.

Q. I want to show to you a chart which is marked as Plaintiffs' Exhibit Number 20. Is this a chart prepared by you and the people who work with you tabulating the results of your survey? A. Yes.

Q. And how many families did you contact altogether in making your survey? A. Seventy-three.

Q. These were the families that were within the path of the highway? A. Yes.

Mr. Saxton: Your Honor, I would like to introduce into evidence this chart, which is the result of that survey [182] conducted.

The Court: All right.

Mr. Upton: I would like to see the chart, your Honor, to see if I have some objections to it.

Mr. Preiser: Your Honor, we would object to it on the ground of materiality, relevancy, competency, and it is hearsay, but I don't want to hear all these people so I am going to withdraw the objection based on hearsay.

The Court: Show Mr. Preiser's objection made and withdrawn and the exhibit admitted in evidence.

Mr. Upton: Your Honor, I have some objections also in addition to that. Some of the questions obviously are just not proper questio as they are phrased on here. For example, I am looking at the seventh or eighth block, "Was the offer comparable to present facilities". That could mean a great number of things. If that was the question propounded, it doesn't mean anything. Under this Act I hope it wasn't comparable to most of the facilities in the Triangle area.

I would assert the same objection and without withdrawing mine, and that's all the additional objections. I think the whole thing is misleading, your Honor, and I cite that one specific example.

The Court: Suppose you inquire about that on cross-examination. We will hold the admission of it until he gets a [183] chance to cross-examine the witness.

Q. Miss Tillman, I refer you again to the chart. How many people in total are in the path of the highway, as the result of your survey?

Mr. Preiser: Your Honor, if we are going to have the document in, why do we have to have it read also in the record? I don't understand.

The Court: Overruled. Go ahead.

A. According to the survey 143.

Q. What is the average monthly income of the people? A. $170.87.

Q. How many persons own their own property within the path of the highway? A. Five.

Q. How many persons rent? A. Fifty-eight.

Q. How many persons have been offered relocation service from the State Road Commission? A. Thirteen.

Q. How many people have had no offer at all? A. Forty-six.

Q. What is the average age of the persons located in the path of the highway? A. Fifty-seven.

[184] Mr. Saxon: That's all I want to ask. Your Honor, there are other questions on this survey but

they do not relate to the issue of relocation so I won't go into those. I have no further questions.

The Court: I would, of course, have to agree with Mr. Preiser and Mr. Upton. Strictly speaking, as a matter of evidence it is purely hearsay but I, like them, shudder at the thought of you gentlemen bringing in all of these individuals to put them on seriatim.

Mr. Saxton: This was exactly the reason we made the survey.

The Court: I appreciate your solicitude of the Court: Under the circumstances I am going to permit it to come in and you gentlemen may cross-examine the young lady on it.

Mr. Preiser: How many whites and how many blacks are shown there?

The Witness: I would have to see the survey, the chart.

The Court: Are there two copies of it?

Mr. Saxton: Yes, your Honor.

The Clerk: Plaintiffs' Exhibit Number 20 admitted.

Plaintiffs' Exhibit Number 20

The exhibit referred to, previously marked for [185] identification, was admitted in evidence.

The Witness: There are twenty-three white families and forty-two nonwhite families.

Mr. Preiser: That's all. Thank you.

The Court: This was done family by family, was it?

The Witness: Yes.

The Court: They are in the path of the interstate. Is that what I understand, gentlemen?

Mr. Saxton: Yes, your Honor.

The Court: It may have been an inadvertence, but I notice you have got numbered serially from one to seventy-three and every once in a while you skip a few numbers. What does that mean?

The Witness: These are families, for instance, who would not—

The Court: Not available for questioning?

The Witness: Who would not answer some specific questions.

The Court: I see.

The Witness: They responded but—

The Court: 67 and 68 you don't have anything all the way across.

The Witness: 67 and 68 through 73 are families who we could not contact at all, working day and night.

[186] The Court: Do I understand this represents the sum total? When did this young lady take this survey?

Mr. Saxton: She can give you the approximate dates.

The Witness: During the month of March.

The Court: Of this year?

The Witness: Yes.

The Court: Would this represent the sum total of the families that are presently in the path of the interstate down there?

Mr. Saxton: It represents the total number of families found in the survey but were not absolutely certain as to the total boundaries of the highway. This is information we were certain that this was within the boundaries but we were not certain that

the boundaries did not go out further. Also it did not take into consideration the proposed Capitol Street interchange, which is not approved but would affect the Triangle area.

The Court: All right.

Cross Examination by Mr. Upton:

Q. I have not yet understood, when was this survey taken? During what period? A. During the month of March.

Q. Of this year? [187] A. Yes, '69.

Q. And at whose direction was this survey taken? A. At whose direction?

Q. Yes, ma'am. Who asked you to do this? A. This was for information for the Legal Aid Society.

Q. In other words, these gentlemen asked you to conduct this survey. Is that correct? A. Yes.

Q. Who is it you work for? A. I work for the Tri-CAP.

Q. What does Tri-CAP stand for? A. It is a branch of OEO of the federal government. It is Tri County Action against Poverty.

Q. Is that part of the AAY-CD?

The Court: Part of the what?

Mr. Upton: AAY-CD. I don't know what it means but I hear everybody talking about it.

A. I'm sorry. It is the AAY-CD.

Q. It is AAY-CD? A. Yes.

Q. It is funded by OEO, I take it. A. Yes.

Q. And you have testified on direct examination that your immediate superior was Mr. Preston. Is that correct? [188] A. My immediate supervisor is Mr. Norman Kilpatrick.

Q. Mr. who? A. Norman Kilpatrick.

Q. Who is Mr. Kilpatrick's supervisor? A. I don't understand the question.

Q. Who is his boss? Who does Mr. Kilpatrick work for? A. For the Triangle Improvement Council.

Q. He works for the Triangle Improvement Council. I am going around in a circle, I believe.

The Court: You are asking the questions.

Q. You work for Tri-CAP, is that correct, which is the TAY-CD, which is funded by OEO. Is that correct? A. Yes, sir.

Q. But you work for Mr. Kilpatrick. Is that correct? A. Yes, sir.

Q. And what is Mr. Kilpatrick's title? A. His title?

Q. Yes. What is his job? A. He is Assistant Director.

Q. Of what? A. Of community organization.

Q. He is Assistant Director of community organization. Who is Mr. Kilpatrick's immediate superior? Who does he report to?

[189] Mr. Saxton: Excuse me, your Honor. I will concede the hierarchy and the bureaucracy of the poverty program is fairly intricate. Mr. Kilpatrick I believe is here and could explain who his employer is but I really don't think this witness is qualified to go into all the breakdowns.

The Court: I'll say this. This witness is not going to get any criticism from the Court for failing to understand this whole labyrinth and the most I would hold her to is for whom she works and for whom she conducted this survey. I am willing to drop it because you are going to turn the corner and go full circle again.

Mr. Upton: She said she worked for Mr. Preston and I am trying to understand his connection. As I understand, he is president of Triangle Improvement.

Q. Is that correct? A. That's right, and I work within the Triangle community.

Q. Do you report to him? Are you accountable to him? Is he your boss, if I make myself clear. A. He is one.

Q. He is one of your bosses? A. Yes.

Q. But he didn't request that you make this study. These gentlemen did. Is that correct? [190] A. Yes.

The Court: Gentlemen, would you tell me something, and this is purely curiosity. Mr. Preston I take it from reading your latest group of affidavits is president of the Triangle Improvement Council. Is that correct?

Mr. Saxton: Yes, sir.

The Court: Is that a voluntary service on his part or is he an employee?

Mr. Saxton: It is voluntary, your Honor. He receives no salary for his position.

The Court: All right. Go ahead, Mr. Upton.

Q. Was the purpose of the survey in connection with this litigation or in connection with HUD?

The Court: Is that a fair question?

Mr. Upton: She conducted the survey at their request.

The Court: Maybe it had a multiple purpose.

Mr. Upton: May I rephrase the question and ask her if she knows?

The Court: I don't think it is material, Mr. Upton.

Mr. Saxton: I will be happy to answer the question.

The Witness: I will be happy to answer the question.

Q. The heading on the top of this chart, the fifth heading over from the left hand side, is the legend in that [191] block the one that was on the questionnaire that you have referred to? It starts with the words "first learned about I-77 taking home." A. What was the question?

Q. Is that the same question from the questionnaire which you used? A. The question from the questionnaire was "When did you first learn about the interstate taking your home?"

Q. Do you have a copy of the questionnaire with you? A. I think there is one here.

Q. I can't hear you. A. I think there is one in the courtroom, a copy of the survey.

The Court: Do you gentlemen have a copy of the questionnaire?

Mr. Saxton: No, your Honor. I apologize. We had one and we misplaced it. We will have another one here.

Q. In putting these captions on the top you have paraphrased the questions from the questionnaire. Is that correct? A. In some of the blocks it was almost impossible to write the entire question, but it still is in essence what the question was on the survey.

Q. Moving over to the seventh block, "Has SRC offered to relocate you?" Was that question complete as it is phrased [192] right there? A. No.

Q. In other words, is that all there was to that question? A. No.

Q. What was the rest of that question? A. "Has an officer from the State Road Commission relocation office offered to relocate you?"

Q. Did this contemplate a personal appearance in their home in an attempt to offer them relocation assistance? Is that what the question contemplated? A. No, it didn't because another question on the survey which obviously could not be tabulated was "How was the offer made, for instance, by letter, telephone, in person?"

Q. You say you did not tabulate that one? A. No, I didn't. There were only six that had been offered.

Q. Let me ask you this. Does the State Road Commission have a relocation office in the Triangle area? A. Yes.

Q. You have seen that office? A. I have been in the office.

Q. You have been in their office? A. Yes.

[193] Q. Was the question asked on this questionnaire any place, had they been to the State Road Commission relocation office? A. No, it wasn't on the survey.

Q. The net question is the one that I mentioned when I was objecting to this, "Was the offer comparable to present facilities?" Is that a question directly from the questionnaire? A. Yes.

Q. That is copied verbatim from the questionnaire? Is that correct? A. Was the offer comparable to present facilities in size of living unit.

Q. In other words, this is not complete as it is on here. A. No.

Q. What does that question mean to you? Did you prepare the questionnaire?

The Court: She said the question was was, it comparable in size of living units. Is that correct?

The Witness: Yes.

The Court: That was the question. It went to the size of it apparently, Mr. Upton.

Q. You mean the living space; cubic feet of living [194] space, so to speak? A. Yes.

Q. Is that correct? A. Yes.

Q. Over here in the eleventh block, "Would rather stay in Triangle if had choice." What else was in that question, if anything? A. "Would you rather stay in the Triangle if you had a choice?"

Q. Choice of what? Choice of moving right now or moving into something else in the Triangle? Did this consider the contemplated Urban Renewal Project in that, rather move out of the Triangle or move into this new Urban Renewal Project? A. Did the survey consider it?

Q. How was the question phrased? A. The question was phrased, "If you had a choice would you rather stay in the Triangle?"

Q. In other words, the question did not contemplate whether you were talking about just moving out of the path of the highway and still living in the Triangle? A. Living in the Triangle?

Q. In other words, these people would rather stay in the Triangle in its present condition than move out. Is that correct? [195] A. Yes; the ones who answered yes.

The Court: Is the import of that question and answer, for instance, let's take a family of four who are living in what has unfortunately been characteristic of housing out in the Triangle district; and

if they were offered, let's say accommodations for four at Orchard Manor, does this mean that they would rather live where they live under the conditions that they were living in the Triangle rather than move to Orchard Manor?

The Witness: All of the families that live in the Triangle, all of the homes in the Triangle are not substandard.

The Court: I know. I have lived here all my life and I know as a matter of fact that there are many that are substandard. Would an individual living there say he would rather live there in substandard accommodations than to move to Orchard Manor?

The Witness: Considering that they answered yes to the question, I don't know what they were thinking at the time, but probably they were in hopes that improvements would be made.

The Court: In other words, what they were saying I take it was that putting aside the type of accommodations they had as a community they would prefer to live as a community in the Triangle district rather than be dissipated [196] into these various other sections?

The Witness: Yes.

Q. Perhaps I should have asked this question first before I got this far. What is your background? Are you a social worker or are you trained in running surveys or things of that nature? A. I have a Bachelor of Arts Degree in Sociology and Psychology from West Virginia State College.

Q. How long have you been out of school? A. Five months.

Q. Have you been working in the Triangle area during that entire period? A. I have been working in the Triangle area since February 11th.

Q. Of what year? A. 1969.

Q. Are the people in the Triangle area generally aware that there is a proposed Urban Renewal Project for the Triangle area? A. Yes.

Q. Do you think that would have had any bearing on this question that they would rather stay if they had a choice? A. Any bearing?

Q. Pardon?

[197] Mr. Saxton: Your Honor, I object to that. I don't think it is material to the questionnaire.

Mr. Upton: I don't know what is in the questionnaire.

The Court: It is as material as the exhibit. Go ahead. Go ahead. Answer the question, will you please?

A. I think that the people knowing that the Urban Renewal Project has been planned for them and during this time the Triangle Improvement Council was trying to come to an agreement, a successful agreement whereby Urban Renewal Authority and the Triangle Improvement Council would have what they wanted for the area, and keeping this in mind—the people who responded to the question were more than likely in hopes that a successful agreement —they would come to a successful agreement.

Q. In other words, they are generally aware of the activities in regard to urban renewal and the possibility there will be some new housing for low income families in the Triangle area. Is that correct? A. Yes.

Q. I don't know whether I asked you this question or not. Did you prepare the questionnaire which you used or did someone prepare it for you? [198] A. No, I didn't prepare it.

Q. Do you know who prepared it? A. The Legal Aid Society.

Q. On your totals at the bottom of your chart you indicate there are 23 whites, 42 nonwhites included in this survey. You indicate that 73—what was the total figure of families surveyed? A. Just a minute, please. Sixty-seven.

Q. Sixty-seven surveyed? A. Yes.

Q. What are these numbers in the first column, survey number? They total up to 73. A. As I stated before, there were some families that we could not reach no matter what time we tried to contact them. Also any time you take a survey there will be some people who are uncooperative.

Q. Do you know whether these uncooperative people were whites or nonwhites? A. Yes, those are indicated. All of those that we even saw we indicated. You can observe race.

Q. Were they whites or nonwhites, the ones that were uncooperative with you and wouldn't answer your questionnaire? A. Some were white, some were nonwhite.

Q. But you don't know how many in each category? [199] A. No, I don't.

Q. Can you tell us the geographic boundaries upon which you conducted your survey? In other words, what general area do you consider the Triangle and the families that are being displaced by this highway in the Triangle? A. From Elk River to Capitol Street north of Browns Al. and south of Dryden Street.

Q. To Capitol Street? A. All the way to Capitol Street, up to Capitol Street, not included.

Q. This includes a survey of those parties living in the Orlando Hotel, I assume, then. Is that correct? A. Yes.

The Court: Where is the Orlando Hotel?

The Witness: It's on Summers Street.

The Court: Where?

The Witness: On the corner of Summers and Dryden Street.

The Court: Do a substantial number of people live there, Mr. Upton?

Q. How many people live in the Orlando Hotel? A. I think there were thirty residents, thirty individuals.

Q. And they are primarily white. Is that correct? [200] A. Yes.

The Court: Would they be included in this chart?

The Witness: Yes.

The Court: Miss Tillman, would the residents of the Orlando Hotel be reflected on here?

The Witness: Yes, those we were able to contact.

The Court: Where would they be? Could you indicate how you could tell those in the Orlando Hotel as against the others appearing on here?

The Witness: Yes, I could if I had the individual survey forms because the number at the beginning of the survey would correspond to that.

The Court: Not that it is terribly important. Do you gentlemen have that information?

Mr. Saxton: We can have the forms, your Honor. We would have to go get them.

The Court: Why don't you have it here tomorrow morning? I notice here a substantial group around

number 34 over on the left and going down for about ten spaces, a number of those indicated white and they seem to be mostly one or two, mostly one, single. Would they be, you imagine, the Orlando Hotel population or not?

The Witness: Probably.

The Court: It might be helpful, gentlemen. As I [201] say, it isn't terribly important.

Mr. Saxton: We will have it here for your Honor.

Q. May I ask, you have referred to families. Can you tell me how you defined a family within this survey? A. According to the survey—

The Court: It's like a household.

Mr. Upton: That's what I am afraid of.

Q. What is a family within the definition? A. Each individual dwelling unit was considered a family. For instance, if it were just one room and one roomer, he would be a family of one.

The Court: That comports with our definition of it, gentlemen.

Mr. Davidson: Of a household.

Q. In other words, if there were a man and wife and one child living in a house and they had one boarder, one person living in with them, would that be one family or two families? A. That would be two families.

Mr. Upton: That's the same definition.

The Court: About the only thing that's remained constant in this litigation. Is that all, gentlemen?

Mr. Upton: I believe that's all.

Mr. Saxton: We found the questionnaire, and if I may I will admit it.

[202] The Court: Give it to Mr. Upton. He is the one that wants them.

Mr. Saxton: May we mark it first for identification?

The Court: All right, sir.

The Clerk: Plaintiffs' Exhibit Number 21 marked for identification.

Plaintiffs' Exhibit Number 21
for Identification

The questionnaire referred to was marked as indicated above.

Mr. Saxton: And if I might, your Honor, with Mr. Upton's permission have it entered into evidence. It is a blank form but it does give the questions and how they were phrased.

Mr. Upton: I failed to move the admission of that little map on the wall.

Redirect Examination by Mr. Saxton:

Q. Can you identify this paper marked Plaintiffs' Exhibit 21, which consists of two pages? A. Yes.

Q. Will you identify it for us, please? A. This is a copy of the survey that we used to conduct—a copy of the questionnaire that we used to conduct the survey.

[203] Q. And to the best of your recollection is this a true copy of that questionnaire? A. Yes.

Mr. Saxton: Your Honor, may we move this into evidence?

The Court: Yes, sir.

The Clerk: Plaintiffs' Exhibit 21 admitted into evidence.

Plaintiffs' Exhibit Number 21

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Upton: May I have my map admitted in evidence also?

The Court: What is the number on it, Mr. Upton?

Mr. Upton: I believe it is Number 4.

The Court: Mr. Saxton, would you be willing to reciprocate and let Mr. Upton move his little map into evidence?

Mr. Saxton: Yes, sir.

The Clerk: Defendant Volpe's Exhibit 4 admitted.

Defendant Volpe's Exhibit 4

The map referred to, previously marked for identification, was admitted in evidence.

Mr. Upton: Your Honor, may I ask, did counsel for [204] the plaintiffs indicate they were going to bring all these questionnaires over here tomorrow? Is that correct?

The Court: We suggested it might be desirable because you got the Orlando Hotel mixed up in this. It isn't critical, but I think Mr. Saxton said they would have them available if you want them.

Mr. Upton: We would appreciate it.

Recross Examination by Mr. Upton:

Q. While Mr. Preiser is looking at that questionnaire, may I ask you this? Who instructed you in regard to how

you should conduct this survey? A. We had suggestions from—I had suggestions from my Director and also—

Q. Mr. Kilpatrick? A. Yes, and also from the Legal Aid Society.

Q. They set out the criteria, the definitions and so forth that you should use in interpreting these questions. Is that correct? A. Yes.

Q. In other words, they set out the guidelines, Mr. Kilpatrick and the Triangle Improvement Council and the Legal Aid Society. Is that correct? A. I don't know about the entire Improvement Council; [205] only what I stated.

Q. The Legal Aid Society and Mr. Kilpatrick. Is that correct? A. Yes, sir.

Q. They prepared the guidelines under which this survey would be conducted, the definition of what a family was. These are the things I am asking about.— A. Yes.

Mr. Preiser: Your Honor, now that I have seen this may I ask a very few short questions?

Recross Examination by Mr. Preiser:

Q. I thought you had responded, Miss Tillman, that with regard to the manner that you got the answers to "Was the relocation offer comparable to your present facilities", I thought you added in size of the living unit. A. Yes.

Q. There were three or four other things, weren't there? A. Yes.

Q. In other words, that question was asked as follows, wasn't it? "Was the relocation offer comparable to your present facilities in: a. size of the living unit; b. rent paid; c. convenience of to: work, shopping, school, church." [206] That's the way the question was asked. Is that right? A. Yes.

Q. And if they would answer that it was not comparable in convenience to, say shopping, then you would put down not comparable on your chart. Is that correct? A. Yes.

Mr. Preiser: That's all; thank you.

The Court: Is that all, gentlemen?

Mr. Saxton: We have no further questions.

The Court: You may step down.

(The witness was excused.)

Mr. Lytton: The plaintiffs would like to call Mr. William S. Preston to the stand.

Mr. Upton: Your Honor, may this witness be subject to recall after we have had an opportunity to see the questionnaires?

Mr. Saxton: We would like to recall her for another matter, so we have no objection.

The Court: All right.

The Clerk: Will you please state your name?

The Witness: William S. Preston.

WILLIAM S. PRESTON called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

[207] *Direct Examination by Mr. Lytton:*

Q. Would you please state your name and address, Mr. Preston? A. William S. Preston, 513 Margaret Street, Charleston, West Virginia.

Q. For the purposes of the record, Mr. Preston, you are a Negro man? A. Yes.

Q. And you are the President of the Triangle Improvement Council? A. That is right.

Q. The plaintiff in this suit. How long have you been a resident of Charleston? A. I have been a resident of Charleston for over fifty years. I was born and reared here. I spent seven years in Pennsylvania going to school and a year in Detroit. Other than that I have lived the majority of my life and boyhood and manhood in Charleston.

Q. Have you also lived in the Triangle area for that time? A. Most of my life I have lived in the Triangle. I went to grade school in the Triangle. I went from the Triangle to the junior high school and I finished high school living in [208] the Triangle.

Q. Mr. Preston, when and how did you become interested in the problems of Negro people in Charleston?

The Court: What is the materiality of that?

Mr. Lytton: I am trying to show, your Honor, the Court in general Mr. Preston's familiarity with the area that he represents and I will be getting into the Triangle Improvement Council's role in this litigation and in the Triangle in particular.

The Court: Can't you hold this to a minimum and confine it to the issue before us as to this relocation problem?

Mr. Lytton: I thought your Honor might like some of the background of the Triangle Improvement Council from the questions you were asking before.

The Court: Like Mr. Preston I have lived here all my life. How old are you, Mr. Preston?

The Witness: Why do you make me do that? Sixty-three.

The Court: I'm not far behind.

The Witness: You finished high school in '28.

The Court: That's right.

Q. Mr. Preston, I don't know if the Court will object to the materiality of this question. Could you give the role [209] of the TIC in the Triangle, some of its roles?

The Court: I don't want to put Mr. Preston under cloture but the Court is well aware of the background and the goals and what not. Let's get down to the issues in this case.

Q. The Triangle Improvement Council as representative of the Triangle area is citing certain issues at this time, one of them being the state role in this case. What are the other two issues that have a great impact on the community, Mr. Preston? What is their impact? A. I would say the Water Company fight and Urban Renewal. The impact is terrible. It has displaced people without proper relocation. There are a lot of people especially that were displaced by the Water Company. I will say there was about eighty families.

Mr. Upton: Your Honor, I hesitate to object to this testimony but I fail to see the relevance of the testimony concerning the Water Company. I have tried to make my objection—

The Court: I understand. Let me say this. We are well aware of the fact that so far as the Triangle Improvement Council and the residents who are resisting this that this is one facet of the aggregate

of the impact of the water system purchase out there and the controversy over the Urban Renewal and Redevelopment and that this is one part of it, and I know that that does have a collateral bearing on it but I don't [210] think it is necessary for you to plow that furrow here. Let's get right down to the interstate corridor and stay with this.

Mr. Lytton: We are trying to show the psychological and sociological impact on the totality of the three impacts.

Mr. Upton: Is the lawyer going to testify, your Honor? I thought you had already ruled. I apologize to the Court for making an objection but I think the record has plenty of this in it already.

The Court: You have taken up twice as much time as he did in the comment he made.

Mr. Upton: I apologize.

Mr. Lytton: Thank you.

The Court: Go ahead.

Q. Mr. Preston, when were you aware of the highway going into the Triangle? A. To tell you the truth, I wasn't aware. I was somewhat complacent. I ran a business in the Triangle for fourteen years and after selling out my business I would say being home, having the rocking chair and looking at TV and noticing certain things and issues coming about, I just said to myself, "I'm not doing anything", that I would be able to do something.

So in 1966 I joined the Triangle Improvement Council and in '68—this was in October of '66. In '68—to be exact May 17th, 1968—I was elected President of the [211] Triangle Improvement Council.

The Court: The question, Mr. Preston, is when were you first aware of the interstate coming through the Triangle area.

The Witness: Well, I would say about the early part of 1967, when it really I would say had an impact on me.

Q. Did you realize at that time that the highway would go through residential Triangle, or did you think it might? A. I didn't give it any thought. I didn't think it would come through there. I paid very little attention to it until toward the last of 1967.

Q. How did you find out finally that the highway would traverse residential Triangle?

The Court: What is the materiality of this?

Mr. Lytton: We are trying to show, your Honor, that the residents of the Triangle, including Mr. Preston, were not aware—

The Court: So they weren't aware. Let's assume that. Your other counsel this morning said they were going to confine this thing to the issue of relocation. Now, confine it to that.

Mr. Lytton: Yes, sir.

The Court: And if this witness has nothing to say on that, then I suggest you take him off the stand.

[212] Mr. Lytton: All right. We will go right to the final question.

Q. Mr. Preston, you have personal knowledge of the Triangle area? A. Yes.

Q. What are the prospects for relocation housing from your personal knowledge? A. From my personal knowl-

edge, and especially—excuse me if I bring in the Water Company again, but it was from that that has made me leery as far as relocation is concerned. Relocation as far as Hammer, Greene and Siler put it, it was very bad in Charleston.

A lot of those people had to relocate themselves. I personally know some. A Mrs. Williams moved from a house on North Rand and then moved to Dorothy Street, two times on Dorothy, eventually was settled in the Manor.

The Court: Did she live on the Water Company site?

The Witness: Yes.

The Court: Let's confine it to the interstate corridor.

Q. Mr. Preston, again I will ask you what are the prospects of the people, as you see them from your own personal knowledge and experience, who now live in the pathway of the interstate, for relocation? [213] A. According to what I have seen I think it is very poor. As I said before, a lot of the people relocated themselves, paid their own relocation, paid for the moving of their furniture and things like that, and I think it is very poor.

The housing situation in Charleston is very poor. Everyone knows that and it is worse for the black man than it is for anybody else. It's hard for him to get a home. MLS doesn't list I would say cheap homes. You probably have to ask for it. What I would call a cheap home is $10,000 or less.

Q. MLS is what? A. Multiple Listing Service.

Mr. Lytton: By the realtors. That's all; thank you.

The Court: Any cross, gentlemen?

Cross-Examination by Mr. Preiser:

Q. Mr. Preston, in your determination that the relocation assistance by the State Road was poor, what did you do to investigate what they were doing? A. I didn't determine or say that I determined that the State Road's relocation was poor.

Q. I misunderstood you.

The Court: Let him answer the question. Go ahead, [214] Mr. Preston.

A. I was making mention I said of all the relocation that I have learned of concerning the Water Company. I was leery about the other relocation that would take place or that is to take place.

Q. In other words, because the Water Company maybe didn't do what was right down there you were afraid that the people who have to do with relocation insofar as the road is concerned may not do right. Is that your point? A. If a dog bites me once, I don't walk up to him again.

Q. Insofar as what the State Road Commission has been doing, they did set up the relocation office in the Triangle area, did they not? A. That's right.

Q. And it is staffed with people and it is open five days a week? A. That's right.

Q. And they do have there available charts and diagrams and people to help show what housing is available? A. I can't say that because I haven't ever been in there but I can tell you this. I have had the relocation man to come to my house to ask me—he knows that TIC is interested in sponsoring homes in the Triangle and has come [215] to me, Mr. Hall, and suggested that I could get land outside of the city to sponsor homes.

Q. You say the TIC is interested in sponsoring homes. You mean the Triangle Improvement Council will build some houses in the area? A. That's right.

Q. How many members are there in the Triangle Improvement Council? A. Oh, well, you consider on the board there are fifteen members, but you see every resident of the Triangle has the right to be a member of Triangle Improvement Council.

Q. That wasn't my question. A. I would say there are approximately about 198, near 200.

Q. Actual members? A. They are members.

Q. Do they come to meetings? A. Not all of them.

Q. Isn't it a fact that some few, like the fifteen who are on the board, sit together and make the decisions, so to speak? A. Yes, the board makes the decisions. We have what we call public meetings and sometimes take to the people the decisions that we have made.

[216] Q. It is a corporation, is it not? A. That's right.

Mr. Lytton: Your Honor, we object to these questions. We were not allowed to go into the Triangle Improvement Council on direct examination.

Mr. Preiser: I will withdraw it.

The Court: You have overwhelmed Mr. Preiser.

Q. Mr. Preston, insofar as housing, you said everybody in Charleston knows housing is bad. Did you know that the people who will be moved from the area where the highway is going to go through the Triangle district will have first priority insofar as Charleston housing is concerned in the three major housing developments, the public housing developments? Did you know that? A. Yes, I have heard that, Mr. Preiser, but you must remember that every-

body who lives in the Triangle won't be eligible for public housing.

Q. Those that are eligible would have no problem? A. They will have priority as far as public housing put into the Triangle. They do not have priority as far as—what is the west side one? Littlepage and Orchard Manor.

Q. That's your thought. In other words, one of your problems—

The Court: I thought your question was argumentative [217] to start with, Mr. Preiser, and I am convinced now that it is.

Q. The basis of your statement, if I understand it correctly, or one of the bases that housing here is bad, you are assuming that the people that are removed from the path of the interstate in the area we are talking about would not have priority. Is that your thought? A. May I say this, and then I will give you my thought. When I said bad, I don't mean bad materially. I mean there is a shortage of housing in Charleston.

The Court: That's what he is addressing his question to.

The Witness: Yes. Your question again?

Q. My question was when you said it was bad, meaning a shortage of housing, you are assuming, as I understand you—and correct me if I am wrong—that the people moved from the Triangle district in the path of the interstate would not have priority at Orchard Manor, Washington Manor and Littlepage Terrace. A. I haven't heard that. I have heard that people living in the Triangle will have priority as far as the public housing to be put in the Triangle but I haven't heard—

Q. That they do not have priority in the others? A. No.

Q. Insofar as the single people who live in the [218] Triangle district I understand from our investigation—and correct me if I am wrong—that there are some 100 individuals, single people, of the group of some 200 who will have to be removed. Does that sound about right? A. Of the group, there are more than 200 people who live in the Triangle.

The Court: He is talking about, Mr. Preston—I assume you are quoting right; you gentlemen can correct me—that there are 200 individuals. Is that it?

Mr. Preiser: 59 families and 116 individuals I have.

The Court: That live in the corridor of the interstate, not in the Triangle in its entirety.

The Witness: Oh, I see.

Q. Does that sound about right to you, sir? A. Just about right.

Q. Altogether 116 individuals. Were you familiar and did you know that within the rent that they are presently paying for renting one room or so, whatever they are renting in the Triangle area, that for the same general price range they can rent and they have available to them at the Lee Hotel at the corner of Lee and Court Street a room at $40 a month, at the Holley Hotel on Quarrier Street—

The Court: Mr. Preiser, I think it would expedite matters—I assume you are going to put that on as a part of [219] your case and isn't it argumentative with this witness?

Mr. Preiser: I think it completely destroys his opinion that we don't have adequate housing for these people.

The Court: Let's not make him commit himself on that one way or the other. He has given his opinion.

The Witness: May I ask Mr. Preiser a question?

The Court: No.

Q. You now live in the Triangle district? A. Yes.

Q. Margaret Street; is that where you live? A. Yes, sir. Margaret Street is a continuation of Young Street. On the north side of Donnally Street it is Young and on the south side of Donnally it is Margaret.

Q. Are you in the path of the interstate? A. No. I am in the path of Urban Renewal.

Mr. Preiser: That's all the questions I have of this witness.

The Court: Is that all, gentlemen?

Mr. Upton: No, your Honor. I would like to ask a few questions, if I may.

Cross-Examination by Mr. Upton:

Q. How old did you indicate you were, Mr. Preston? A. Sixty-three February 25th, 1969.

[220] Q. Mr. Preston, as I understand it in your official capacity as President of the Triangle Improvement Council you are also in negotiations with the Urban Renewal Authority. Is that correct? A. Yes, somewhat.

Q. And you have given your tentative approval, as I understand it, to that project. Is that correct? A. No. No, we have not. The agreement is—

Mr. Upton: Forget about it.

The Court: Let's get off of that too.

Mr. Upton: I will withdraw the question.

Q. Mr. Preston, have you ever made a personal appearance at the Bureau of Public Roads office in regard to any of the difficulties with the relocation efforts of the State Road Commission? A. Here in Charleston?

Q. Here in Charleston. A. No, I haven't.

Q. You have never contacted any of the local officials and aired your complaints? A. The Bureau of Public Roads, you mean?

Q. Yes. A. The federal bureau?

Q. Yes. [221] A. No, I haven't.

Q. You indicated none here in Charleston. Have you ever made an appearance any place else? A. I have never made an appearance but I have met—I believe they called him Mr. Sonaveck or something. He was stationed in Washington and then later moved to Maryland.

Q. Swanson? A. Sonaveck. I believe that's the name.

Q. That's the only contact? A. I wrote Mr. Birdwell.

Q. Who else? A. I wrote to Senator Randolph.

Q. Anybody else? A. I wrote to Mr. Hamill.

Q. Anybody else? Mr. Hamill is not connected with the Bureau of Public Roads? A. Yes, but I wrote to him.

Q. Did you write to anybody else connected with the Bureau of Public Roads? A. Are you speaking federally or state?

Q. The Bureau of Public Roads, which is part of the Department of Transportation of the federal government.

Mr. Lytton: Your Honor, we object to the materiality of this line of questioning too. This is outside

the scope of [222] direct. We were limited. I think they should be limited.

Mr. Upton: Your Honor, he has made assertions about the problems in this area and I want to know if he has made any complaints to the local officials.

The Court: What difference would it make in the context of this case, whether he had or had not?

Mr. Upton: Part of the allegation is that the Bureau of Public Roads is not properly supervising the activities of the State Road Commission, and I am trying to find out if he has made any complaints to the officials, Mr. Saunders, who testified here, and Mr. Saunders' superior here in Charleston. I think it is very material to find out whether any complaints have been made to the proper officials.

Q. The answer to my question is you have never made any complaints to any of the federal authorities here in Charleston? A. No. No.

Q. Mr. Preston, are you the same William S. Preston that was convicted of selling stolen goods in 1959?

(Commotion in the rear of the courtroom)

A. Yes. I don't mind telling that.

Mr. Lytton: Objection.

Mr. Upton: That's all.

The Court: What was the outbreak from back there?

[223] From the Audience: I'm sorry, your Honor.

The Court: Step down.

The Witness: May I answer the young ladies? They might have records concerning the TIC—.

The Court: It makes no difference, Mr. Preston.

The Witness: Okay. Thank you.

(The witness was excused.)

The Court: All right, gentlemen.

Mr. Davidson: Your Honor, we wish to call to the stand Peter Abeles.

The Clerk: Will you please state your name?

The Witness: Peter Abeles.

PETER ABELES, called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Davidson:

Q. Please state your name for the record. A. My name is Peter Abeles.

Q. What is your profession, Mr. Abeles? A. I am a city planner.

Q. Please describe your education, Mr. Abeles. A. I have a Bachelor of Science from Cornell University. I have a Master of City Planning from the [224] Massachusetts Institute of Technology. I have done a year of postgraduate work from the Israel Institute of Technology.

Q. What year did you receive your Master's in City Planning? A. I received my Master's in 1958.

Q. While studying in Israel were you on a fellowship? A. I was a recipient of a Fullbright Fellowship from the United States Government.

Q. What organizations do you belong to? A. I am a member of the American Society of Planning Officials, Planners for Equal Opportunity, a former member of the American Institute of Planners, National Housing and Redevelopment Officials.

Q. What is your present employment, Mr. Abeles? A. I am President of a planning firm known as Abeles and Schwartz.

Q. How long have you been associated with the firm? A. Since its inception in 1967.

Q. Please describe some of the undertakings of the firm in the area of urban development. A. We have a major contract from the City of New York, both from the Department of Development and from the Department of City Planning to (a) produce a development plan for the lower east side of Manhattan and to prepare a long range [225] master plan.

We are also under contract to the City of New York to prepare a master plan and provide consulting services for that plan for the area of New York known as Washington Heights.

We are the general planning and housing consultants to the City of Englewood, New Jersey, where our responsibility is in the area of the city's workable program, parts of its Urban Renewal Plan, its housing program and general planning advice.

Q. In the course of that work is it your task to prepare relocation plans? A. It is.

Q. Has your firm engaged in work in the City of Charleston? A. Yes, we have.

Q. Please describe that work. A. We have been retained by two different clients on a variety of occasions starting with the summer of last year. On two occasions we were retained directly by a group known as the Intercity Council of Charleston to help and assist them in evaluation of the city's master plan and Community Renewal Program.

After that we were retained by the Volt Corporation [226] on a per diem basis from time to time to assist the

Triangle Improvement Council in the areas of Urban Renewal and relocation.

Q. I would like to return to that in a minute, but continuing on with your other aspects of your present employment, are you involved in any federal comprehensive planning programs? A. We are involved in two so-called Section 701 programs which are master planning programs for municipalities in New York State. In addition I have been involved in numerous federally sponsored planning and renewal programs.

Q. Does the work in preparation of a master plan involve an analysis of housing resources in the community? A. Yes, it does, especially if you were to do it under a federal grant.

Q. Prior to your association with the firm of Abeles and Schwartz what was your employment? A. Proceeding backwards I was Director of Housing for New York's first antipoverty organization called Mobilization for Youth. I was there from 1967 to 1965. In that capacity I was responsible for building and completing the first rent supplement project in the State of New York.

Prior to that I was a Project Director for a national consulting firm known as Candeub, Fleissig and [227] Associates in Newark, New Jersey. In that capacity I was stationed a substantial portion of my time in Wheeling, West Virginia and was responsble for master planning and development projects in the Ohio Valley, which included programs in this state and Ohio.

Q. Prior to your work with Candeub and Fleissig were you employed as a planner as well? A. Yes, I was employed for three years prior to that starting in 1959 by the government of Israel, first as an individual consultant and secondly as director of a special task force to develop housing policies and new towns.

Q. Have you had any academic experience? A. Yes. I have been guest lecturer at Harvard, Yale, NYU, I have been a Great Hall lecturer at the Cooper Union Forum in the City of New York.

Q. Are these lectures on the subject of planning and housing? A. Yes, they are.

Q. Do you have any publications? A. I have numerous publications and articles in the field of planning and housing.

Q. Do these consist mainly of master plans you have prepared? A. Master plans, evaluation of planning, discussion of [228] housing problems, reports varying from required technical documents to general statements for the public.

Q. When did you first become acquainted with housing problems in the City of Charleston? A. In the summer of 1968. I think it was for you, if my recollection is correct.

Q. Did you visit Charleston? A. Yes, I visited Charleston at that point for I think a period of approximately six days.

Q. What did you do while you were here? A. During that period I visited every part of the city, met with numerous private citizens groups, members of the City Council, public officials, and in addition to which, for the record, prior to coming to the city I received all available public documents on housing and planning in the city and studied these thoroughly.

The Court: Under whose auspices did you say you first came to Charleston?

The Witness: I was paid by the Intercity Council, which I am led to believe is a collection of anti-poverty groups which work out of the county, Kanawha County area, if I am correct.

The Court: Is that federal?

The Witness: Yes, sir.

[229] The Court: Another federally sponsored group.

The Witness: Federally paid. It is locally sponsored.

Q. At that time did you undertake an analysis of the city's proposed master plan? A. I did.

Q. Did you have occasion to look at drafts of the Comprehensive Plan? A. I did, in detail.

Mr. Upton: Your Honor, I don't know whether this is the appropriate time to object or not, but we are getting started down the path on the Urban Renewal Authority and studies in connection with that. I would strongly urge my objection as to the materiality of all of this.

The Court: Won't you even let us start down the path?

Mr. Upton: I would prefer not, your Honor. It has been a long day and if I can do anything to limit it—

The Court: It's quite early. I am sure Mr. Davidson is going to confine it to the issues here. I trust he is.

Mr. Davidson: I will.

The Court: You aren't going to try to review the whole Urban Renewal?

[230] Mr. Davidson: I am still qualifying Mr. Abeles. As we proceed the discussion will bear upon the highway problem and the relocation problem. It may come from different sources but it will bear upon that problem.

Mr. Upton: Your Honor, this "bear upon" is what is occasioning concern again. Are we going to consider the total impact?

The Court: Suppose, Mr. Upton, you let the Court determine when we have crossed the line of demarcation.

Mr. Upton: Yes, your Honor. I wanted to note my objection.

Q. Was one of the documents you studied the document marked as Plaintiffs' Exhibit Number 17? A. Yes. That is all I had when I studied the city's housing problem.

Q. Did you testify at any public hearings at that time?

The Court: This we are getting out. Let's get into the corridor of the interstate, see what his thoughts are.

Mr. Davidson: May I finish qualifying him as to his experience in Charleston?

The Court: I am perfectly willing to concede you have qualified him.

Q. Have you examined any other documents? A. I have examined a number of documents which are [231] relevant to this problem of the corridor, including the proposed Community Renewal Program, the draft of the city's Triangle Urban Renewal Program, which touches this corridor, market studies and numerous others, all available from the city.

Q. Is the document you described as Community Renewal Program marked as Plaintiffs' Exhibit Number 14? A. It is to the best of my knowledge.

Q. Have you also studied Plaintiffs' Exhibit Number 16? A. I have.

Peter Abeles—for Plaintiffs—Direct

Q. Please describe Plaintiffs' Exhibit Number 16. A. Plaintiffs' Exhibit Number 16 is a report prepared for the municipality by a Washington consultant entitled the Housing Dimensions of the Charleston Community Renewal Program. This is the basic working paper which then went into the Community Renewal Program, which is your Exhibit Number 14, just in more detail.

Q. Do these reports describe the impact of the interstate highway system in Charleston on the housing problem in Charleston? A. They treated in depth the impact on Charleston of the general proposed highway and the general ramifications of the highway in the context of the general housing situation.

Q. Does the Comprehensive Plan which is marked as Plaintiffs' Exhibit Number 17 also describe the interstate [232] highway and its impact on housing? A. It describes the interstate. It does not in the quantitative degree describe it as it is described in the Community Renewal Program.

Q. Have you in the course of your work become familiar with federal requirements for relocation housing and Urban Renewal Programs? A. I have.

Q. Have you had an opportunity to become familiar and acquaint yourself with the requirements for relocation of highway programs? A. I have.

Q. Are these requirements the same?

Mr. Upton: I object.

The Court: Doesn't that call for a legal conclusion? I am perfectly willing to grant your man expertise in his planning but I still decide the questions of law in this court, whether right or wrong. Confine it to that. Let's go.

Peter Abeles—for Plaintiffs—Direct

Q. As a planner charged with the formulation of a relocation plan for a highway program, is your task similar or different from the task you would have as a planner for an Urban Renewal Program? A. Basically the same.

Q. What is that? [233] A. Because the requirements under current regulations for displacement, be it caused by the programs under the Department of Housing and Urban Development or by the Department of Transportation, are the same. You are asked to proceed in the same manner, give the same services, undertake the same kinds of studies.

Q. What is the definition of acceptable relocation housing? A. Definition of acceptable relocation housing?

Mr. Upton: Your Honor—

The Court: As a matter of law, or what?

Mr. Davidson: As a planner preparing a plan and recommending one.

The Court: Mr. Upton, please sit down.

You are getting pretty far afield here, aren't you?

Mr. Davidson: I believe not, your Honor.

The Court: Maybe his ideas as a planner would be one thing, however desirable they might be, but I am interested here in this particular piece of litigation and nothing more.

Mr. Davidson: May I rephrase that?

Q. In your work with Urban Renewal Programs how have you been asked to define acceptable relocation housing? A. That the housing to be provided meets a number of criteria. First, it should be no less physically desirable [234] from the quantity of space, quality of the fixtures. It should meet standards, local standards of being

safe and free from hazards. It should be so located so that in effect you do not deny the persons being relocated access to jobs, general community facilities, educational facilities, shopping.

An important point being stressed more and more today under adequate relocation housing is that the person to be relocated has not only these elements to choose from but also an element of choice; that is, he doesn't necessarily have to take the one house which meets safe and decent standards and has accessibility to his job but he may also have a choice for another one. He is not forced to go to one source for housing.

Q. How do you as a planner measure the availability of relocation housing? A. It is quite complex. It has got to be measured within the context of the total housing situation. You have got to consider a city and its housing sources as a closed vessel, that anything that takes housing out of that vessel takes it away from all other sources requiring housing, that if the vessel stays the same shape, the problem stays the same.

If the vessel, total number of people in the city, for instance, expand, become greater, but the housing remains the same, the problem becomes greater for people who are to be relocated, or future relocation problem.

[235] Q. Are you familiar with the term vacancy rate? A. I am.

Q. Will you please define that? A. Vacancy rate generally is used to define the number of dwelling units which were vacant at the point at which the vacancy was measured. It is one of the important terms in determining the general availability of relocation housing.

Q. Does the U. S. Census provide a method for calculating vacancy rates? A. They provide two. They provide

a method for calculating vacancy rate and I think what they call the effective vacancy rate, which is something else. The one that we are concerned with actually measuring relocation housing is the effective vacancy rate, which is the number of units from the total stock which are empty, which are actually available, not counting those which are vacant but ready to be torn down or vacant but leased to somebody else or vacant and seasonal housing but actual number of units which a person can go and shop for on the open market.

Q. Does the 1960 census show the vacancy rate in the City of Charleston at the time of census? A. I think the latest figures are '66. I'm not sure.

Q. What was the vacancy rate as shown by the census, if you recall it? [236] A. The vacancy was 4.6; the effective vacancy was 2.7.

Q. Are those figures derived from the studies you have there before you? A. Yes, they are.

Q. Does a vacancy rate of 2.7 percent allow sufficient units for relocation housing? A. No. It is the general professed belief when you hit a vacancy rate below three percent in effect you have no relocation housing on the private market, on the total market available.

That is, at three percent the situation is so tight that for all practical purposes it doesn't supply relocation housing. In fact, federal regulations and most programs stipulate when you have a vacancy rate of three percent or less that you must provide housing, replacement housing, on the basis of one additional new house to be constructed within the jurisdiction for every one house that you have to take out.

Q. Has the housing problem in Charleston changed in any way since 1960? A. According to the information

that I have, it has increased in terms of severity.

Q. What have been the factors in that development? A. In very simple terms, the housing supply of Charleston decreased from 1960 to 1966 by approximately 1900 [237] units. Most of these units can be identified as being low to moderate income housing units. To the housing supply were added 1500 units, most of them being identified in the Community Renewal Program as being homes for moderate, for middle and upper income families.

The population of Charleston, however, remained just about constant, in fact, projected to increase in the 1970 period, in which you have had a general decrease, a net decrease of 400 units, a probable net decrease in the low and moderate income field of some 1900 units, yet your population demanding this housing has not changed at all and probably has had some slight increase, so the total effect since 1960 has been a tightening of the housing market.

Q. Has any low rent public housing for families been constructed since 1960? A. I think one project of 100 units for the elderly have been construeted since 1960, but nothing in the private market that I know of.

Q. Is the City of Charleston taking advantage of any leased housing programs for low income persons? A. Currently not; to the best of my knowledge.

Q. In considering the problems of finding relocation housing for persons to be displaced by the highway, can the highway be considered independently of other public actions [238] causing displacements? A. No, because they compete during the time of dislocation and time of relocation with both public and private actions which also cause a demand upon the same housing market, and I might add here in planning circles and in most federal requirements

you have to think of the housing market within a specific geographic area; that is, you can't consider new housing being constructed in St. Albans or Montgomery or Spencer.

The displacement caused by the highway must compete for the same amount of housing with displacement caused by local floods, fires, condemnations, conversions, private and public projects.

Q. Are you familiar with the requirements in the Urban Renewal and HUD of the workable program? A. I am acquainted with the general HUD program called the workable program.

Q. Please describe what the workable program is. A. The workable program is the basic—

The Court: Aren't you getting outside any appropriate limits for this case?

Mr. Upton: It comes right back to highways.

The Court: He said that it has an impact on it. I will accept that.

[239] Mr. Davidson: If I might be permitted a few questions, I can show the relevancy to this.

The Court: Ask the question and let's see the relevancy.

Mr. Davidson: Please mark this as Plaintiffs' Exhibit Number 22.

Plaintiffs' Exhibit Number 22 for Identification

The paper referred to was marked as indicated above.

Q. Mr. Abeles, I show you exhibit marked Plaintiffs' Exhibit Number 22 for identification and ask you to examine and identify the document. A. I know the document and am familiar with it.

Q. What is it, Mr. Abeles? A. It sets out the appropriate federal regulations for a city's compliance with what is

called the workable program in order to be eligible for sums of federal assistance under HUD, especially the housing programs.

Q. Do these regulations require the City of Charleston to describe the displacement which will be caused by highway programs? A. Yes, they have to describe fully their total relocation problem in order to submit this to the federal government.

Q. In what way does the federal government use the [240] workable program? A. Well, the workable program is designed to show the city doing an active and responsible job for solving its urban problems effectively on a comprehensive basis the steps for granting the city the assistance of the federal government in the field of urban affairs.

Q. Does the government consider the provision or lack of provision of relocation housing for highways? A. It has become a major thrust in the review of the workable program.

Q. Does the City of Charleston currently have a certified workable program? A. To the best of my knowledge it does not have a workable program in effect.

Q. I show you Plaintiffs' Exhibit Number 18 and ask you whether you have seen this document. A. I have.

Q. What is it? A. It is a letter dated March 1st from the Regional Office of HUD to the Mayor, Mayor Dodson, from Samuel H. Hawthorn in which the HUD official states that "We find that the program, as submitted, does not demonstrate sufficient progress to justify our recommending recertification at this time." It is basically a letter of rejection of the workable [241] program.

Q. Does it discuss the problems in Charleston of finding relocation housing for displaced persons? A. On an attached memorandum to it it makes—

Mr. Upton: Your Honor, we are going to renew the objection we made earlier to this particular document. This memorandum does not show who prepared it and it is the grossest of hearsay.

The Court: I will sustain the objection.

Mr. Davidson: Your Honor, the covering letter indicates—

The Court: What difference does it make? It is hearsay.

Mr. Davidson: No, it is an official communication.

The Court: So what if it is an official communication? Where is the man who wrote it?

Mr. Davidson: The man who wrote it is a federal officer.

The Court: Does that entitle you under the rules of evidence to put in evidence here a fugitive letter?

Mr. Davidson: It is a communication about a public document.

The Court: I sustain the objection.

Q. Must a city have a certified workable program in [242] order to undertake low rent housing programs? A. It must have a certified workable program to undertake any low rent housing program with governmental assistance with the exception of the leased program and the so-called Section 236 program.

Q. If the City of Charleston is unable to certify its workable program because of its failure to relocate persons displaced by interstate highways, will this have an effect on its ability to rehouse low and moderate income persons in Charleston? A. Yes. Since the private market will not be able to sustain the relocation load, the only way of providing housing is through government programs, and if you

don't have a workable program in effect you can't get to first base and build anything.

Q. Do the reports which you have studied indicate whether racial restrictions in the housing market affect the ability of Negroes to find relocation housing? A. It does.

Q. What do the reports show? A. In the city's Community Renewal Program it goes into some detail to the specific problems of the black population of getting housing due to racial frictions and restrictions.

Mr. Davidson: Please mark this for identification [243] as a Plaintiffs' Exhibit.

The Clerk: Plaintiffs' Exhibit Number 23 marked for identification.

Plaintiffs' Exhibit Number 23 for Identification

The paper referred to was marked as indicated above.

Q. Mr. Abeles, I show you Plaintiffs' Exhibit Number 23 for identification and ask you to examine and identify the document. A. It is a base map of the City of Charleston, West Virginia. By the use of color identification it shows the black or the nonwhite community of the city by the degree of concentration. It has three categories, where there are between 100 to 75 percent black people per city block, where there are from 74 to 50 percent black people by city block, and where there are from 49 to 25 percent black people by city block. The source is the United States Census, 1960.

Q. Did you prepare this map, Mr. Abeles? A. I did.

Q. For what reason? A. To demonstrate for the Court that in this city there is a concentration in very specific areas of the black community.

Q. As a planner does this tell you that the housing market is racially open or racially closed in Charleston? [244] A. With the addition of other knowledge and from readings I have, this map would give a reasonably clear picture that the housing market in this city at the point from which these numbers were made was a restricted housing market.

Q. Do you have an opinion whether Negroes displaced by public actions, including the highway, would have an equal opportunity as that enjoyed by whites in Charleston to find relocation housing? A. In my opinion they would not enjoy the same—by any degree the same opportunities for finding relocation housing in the private sector.

Mr. Davidson: Your Honor, I would like to offer Plaintiffs' Exhibit Number 23 in evidence.

Mr. Upton: I will object again, your Honor. I still fail to see the materiality. I believe he indicated this was based on the 1960 census. Is that correct?

Mr. Davidson: Perhaps I can ask the witness one or two more questions that might go to that question.

The Court: You don't have to if you don't want to. I am going to admit it.

Plaintiffs' Exhibit Number 23

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Davidson: I think I would like to anyway.

[245] Q. Have you in your visits to Charleston had an opportunity to observe the racial concentrations of persons within the City of Charleston? A. Yes, in some detail. As I mentioned earlier I did I think travel every part of the city and spent time in most parts, and this is very

clear from those visits that the black population is quite concentrated in specific areas. I think the map is a very close approximation of what I saw when I visited here.

I might just explain for the record there is a small hole in the map. I started to mark one block by accident, so I physically removed that block from the map.

Mr. Davidson: Please mark this exhibit as Plaintiffs' Exhibit Number 24.

The Clerk: Plaintiffs' Exhibit Number 24 for identification.

Plaintiffs' Exhibit Number 24 for Identification

The paper referred to was marked as indicated above.

Q. Mr. Abeles, will you please examine and identify Plaintiffs' Exhibit Number 24? A. This is a blow-up of a base map which I think is the interstate book. It has most of the area commonly known as the Triangle outlined in block form. It also shows the existing railroad right of way and a proposed alignment I think [246] of the interstate.

It has on it in three colors the areas which have been or will be affected by public action in the Triangle. It has running through the middle of it a sort of herringbone pattern indicating the amount of land that the interstate will take. Directly above that covering three blocks or so in deep blue the amount of land tentatively devoted to a water filtration plant and directly below it it has outlined the area to be included in the Triangle Urban Renewal Project, excluding the public housing, which is not to be affected by that project.

Peter Abeles—for Plaintiffs—Direct

Mr. Davidson: We offer Plaintiffs' Exhibit Number 24 in evidence; your Honor.

The Court: All right. It will be admitted.

The Clerk: Plaintiffs' Exhibit 24 admitted in evidence.

Plaintiffs' Exhibit Number 24

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. On Plaintiffs' Exhibit 23 please indicate what the blue lines are. A. The single blue line is an approximation that I made of the highway, interstate highway, being presently proposed as it goes through the central area of the City of [247] Charleston.

Q. Is the Triangle the only black area to be affected by this highway? A. From this map it is quite clear that the highway will not only affect the Triangle but two other areas, three other areas in which there is a concentration of the city's black population. Reading from Exhibit 23, first of all it cuts off the bottom of an area commonly known as Wertz Avenue, which is one of the other important Negro neighborhoods, and then there are two other concentrations of black people who live just south of the highway as it follows, as it cuts along the bottom of the hillside after it leaves the Triangle.

Q. Based on your studies of Charleston, have you been able to form an opinion of whether adequate relocation housing resources are available to rehouse persons displaced by the interstate highway system in Charleston? A. In my belief, no.

Mr. Upton: Your Honor, I am going to object to that question because I think encompassed in it

are situations which do not exist; for example, the proposed Urban Renewal. It has not been approved.

The Court: That might well go to the weight of his opinion. I am going to let him ask him his opinion. Go ahead.

A. My opinion as far as what has happened in the past [248] and with reason to project in the future, including building this highway and other projects, the total net effect will be very deleterious to people who will be affected by such public action.

Q. Are there actions which the State Road Commission and the Federal Department of Transportation take to minimize the harm that you describe? A. Yes. In my opinion the alignment of the highway, the general alignment of the highway did not seem to respect the problem of the housing. It seemed to avoid all the industrial areas or warehouse areas with care from my study of the plans but it made no—as far as I could see there was no attempt made to conserve either land or residences in the way the highway is presently laid out.

Mr. Upton: Your Honor, I move to strike that question and answer because I understood the issue was confined to relocation housing and not where the highway was being placed. This is the area I thought we ruled out early this morning in this lawsuit.

Mr. Davidson: Your Honor, the question was asked simply to find one of the ways which might be followed to reduce the relocation housing problem. The other ways, of course, are immediate crash programs to construct low and moderate income housing.

[249] We wish to suggest if this Court rules favorably with us there are practical alternatives available to the defendants in this action so that they can both build their highway and provide for the relocation of persons displaced.

The Court: All right. Your objection is overruled, Mr. Upton.

Q. Are there any actions that the City of Charleston might take to provide for relocation housing? A. There are numbers of actions. I don't want to burden the Court by going to great specific details, but both the Highway Act and the HUD Act provide a variety of tools which can be used to solve the problem.

In fact, the city's own Community Renewal Program itemizes such tools and calls for the utilization—and I might add one of the reasons they gave great emphasis to doing a job of getting some housing built prior to causing large scale dislocation of people and families was the recognition of the problem they give the housing situation in Charleston, that one had to produce a substantial amount of new housing if one wanted to tear out old housing and improve the city.

Q. Have you been able to form an opinion whether the City of Charleston and its various subagencies have fully utilized programs available for the construction of low and moderate income housing?

[250] The Court: I am confident that's not material. What they could have done is entirely outside the ambit of this inquiry.

Q. Do you have an opinion of whether in the immediate future there are programs which the City of Charleston

might take advantage of which would provide low and moderate income housing? A. There are programs which would certainly accelerate the production of more housing the city could take advantage of or could undertake to do.

Mr. Davidson: Your Honor, we tender the witness to cross-examination.

The Court: All right. Cross-examine, gentlemen.

Mr. Upton: Your Honor, first of all before I attempt to start my cross-examination I would move to strike the entire testimony of this witness for a number of reasons. Obviously his opinions are based on reports which you have heard the Mayor describe here, some of which were incomplete and for various and other sundry reasons that he expressed in regard to those documents; some were in process of being revised and so forth.

For that reason I would move to strike his entire testimony as his opinions are based on an improper foundation. Secondly, the constant reference in his testimony, in his [251] opinions, to the HUD and Urban Renewal problems in this valley which have not been consummated. I have yet to understand the materiality of his testimony other than the fact that we do have a problem with housing in the Kanawha Valley and I think everybody would be willing to stipulate that. I think his entire testimony is immaterial and I would request the Court to strike his entire testimony.

The Court: After I have overruled your motion to strike his testimony, do you want to cross-examine?

Mr. Upton: Yes, I would; very much so.

Cross Examination by Mr. Upton:

Q. Mr. Abeles, as I understand it you are a city planner. Is that correct? A. That's correct, sir.

Q. Are you a registered professional engineer? A. No, sir.

Q. Your background is in the field of architecture and things of that nature. Is that correct? A. My background is in the area of engineering, sociology, economics, constructive housing.

Q. But you do not have an engineering degree? A. I do not have a degree in engineering; that's correct.

[252] Q. Is your degree in sociology? What is your degree in? I failed to understand that. A. The degree is a Master of City Planning, the same as a Doctor of Law.

Q. A Master's in City Planning. Is this an undergraduate degree? A. It is a Bachelor of Science Degree in Agricultural Engineering.

Q. In what kind? A. Agricultural Engineering.

Q. Now, Mr. Abeles, just for the purpose of the record we have been trying to define this today. Who is paying for your appearance here today, sir? A. Well, let's say I hope—

Mr. Davidson: Is that material to his testimony?

Mr. Upton: It goes to his credibility, your Honor, if for no other reason.

The Court: I expect it probably is.

A. I have been told that I would be paid by the Volt Corporation. The Volt Corporation, to get over this point quickly, your Honor, is a private corporation hired by the federal government to retain expert consultants to be available to poverty groups on a nationwide basis.

The Court: Is this a fact?

[253] The Witness: This is a fact, your Honor, as sure as I'm sitting here. I think the purpose is it gets rid of the bureaucracy in hiring people.

Q. As I understood your testimony, Mr. Abeles, you indicated you first became aware of the housing problems in the Kanawha Valley during 1968. Is that correct? A. That's correct.

Q. And that was as a result of your consulting firm being hired by a corporation here in Charleston. Is that correct? A. I think I was hired personally. I don't think the firm was hired as a firm. I think that particular contract was executed with me as a person. I think it was AAY-CD, Intercity Council. You will have to excuse me for not being brief, but the plurality of agencies befuddles even the people who get paid by them.

Q. That's correct, and I happen to be one of them. You indicated in your testimony that you were familiar with the regulations of the federal highway programs and I assume that includes 80-1-68 and the amendments thereto. Is that correct? A. No, I was familiar with the relocation requirements of the 1968 Act.

Q. Does that include the Instructional Memorandums [254] which follow in regard to relocation? A. If you will get me the piece of paper we are discussing, I can tell you.

Mr. Upton: That's Plaintiffs' Exhibit Number 3. This is Number 3, your Honor. It includes the amendments.

A. No, there is another document.

Q. That starts at the back and comes forward. A. I'm sorry. Here we are. Is that it? Yes, the back part, the

document Instructional Memorandum 80-1-68 entitled Relocation Assistance and Payments—Interim Operating Procedures.

Q. That's correct. That's what we have been referring to here I believe today, Mr. Abeles, as 80-1-68. A. I was wondering what that document was and I have it now.

Q. Your testimony then is that you are familiar with this Instructional Memorandum of the Bureau of Public Roads and the amendments to it. Is that correct? A. That's right.

Q. You indicated in your testimony that in your opinion there should be some element of choice on the part of the people who were being displaced. Is there anything in those Instructional Memorandums that require this, or is that just your opinion? [255] A. No, that's not just my opinion. I think that the reference there was under the workable program requirements you have to set out a choice in relocation housing. It was not specifically to this particular memorandum.

Q. In other words, your reference was to HUD, is that correct, and their workable program? A. That's right.

The Court: Let's clear up one thing. Would the same thing apply to the relocation procedures under the 1968 Federal Highway Act?

The Witness: I would think so.

The Court: Not what you think. I take it HUD has well defined lines.

The Witness: Very clearly so.

The Court: It appears here today that aside from the statute the principal thing we have is this. It has its genesis in this 80-1-68. That's what I am interested in, whether there is anything in that that would make this analagous or identical to the requirements

that you have referred to in your experience with HUD.

I think that was the meaning of your question, wasn't it, Mr. Upton?

Mr. Upton: That's correct. If there was such a provision in the 80-1-68 or its amendments.

[256] A. Not to my direct knowledge.

Q. And you have indicated you are familiar with this? A. That's right.

Q. If you are familiar with it and you are familiar with the regulations, then we must assume it isn't there. Is that correct? A. No, I don't think you can assume that. I looked at it again last night. It is a document of some thirty pages. Reading these kinds of material you begin to snap up immediately the consistent phraseology in all government regulations. As I read it I thought I was reading the kinds of regulations that would appear under HUD in how you determine eligibility, how you handle relocation problems, and I suspect if I gave it a careful reading I would not be surprised to find appropriate comment that people had to have a choice in housing.

Q. I assume your reading last night wasn't the first time you had read 80-1-68 and its amendments. A. No, that's not a correct assumption. Last night was the first time I read it.

Q. Last night was the first time you had read 80-1-68? A. That's correct.

Q. To make this perfectly clear, we have been discussing it here at some length, or I have anyway—is it correct that Charleston does not as of this date have a workable [257] plan or an approved Urban Renewal Program, approved by HUD? A. Well, as of this date as far as I know

you don't have a workable program and you don't have—or the city, rather; I'm sorry—it has a proposed Urban Renewal Program. It hasn't been approved, is the best way we can say it for the sake of accuracy.

Q. In other words, the program has been submitted to HUD but has not been approved. That's what your testimony is? A. That's right.

Q. Going back to the regulations again, you indicated that in some regulations which you had read that there was a requirement that once the effective vacancy rate had reduced below three percent that you were required a one for one replacement. Is that my understanding of your testimony? A. That is.

Q. Is there any provision such as that in 80-1-68? A. As far as I know, no.

Q. As a matter of fact, is there any provision in 80-1-68 for the Bureau of Public Roads to undertake a house building project? A. I'm not sure. I'm not sure whether the Joint Development Act is specified here but under the new regulations pertaining to highway I think it does spell out in appropriate situations that the process of building the highway should be [258] linked with a general development of housing. If you would like me to look for it, I would be glad to.

Q. It refers to coordination. A. I think it goes more than that. I think it makes it possible, which wasn't the case prior to the '68 Act. The intent of the '68 Act from what I know of it was up to that point highway building had not taken a responsible role in the problems it had created, and one of the things the 1968 Act attempted to do was to insure that we didn't only build highways; we also assure either homes will be there or we include the provision of building homes with the highway.

I do know from my New York experience with another interstate that the cost of buying land and undertaking the necessary action to build housing, schools, what have you, is an applicable cost of a highway.

Q. You mean in the consideration in the planning of the highway itself? A. In the consideration and execution thereof. That is, you can get paid. If you took this road and you put it, let's say under the ground and you decided to build housing on top of the tunnel that you had made with this road, you could then get as part of the cost of the highway the cost of those structures to do that.

Q. You mean to build the houses? [259] A. To buy the land to build the houses on. The cost of the housing would still have to come under—I'm sorry to say this—under other federal programs. I think the point I am trying to bring out is that you are not only allowed but it is possible because of the cost formulas to include those items in road buildings. That's as clear as I can sum it up without getting the actual legislation in front of me.

Q. You are familiar after reading the '68 Highway Act and these IM's— A. Yes, sir.

Q. —that the funding for a project such as HUD's projects for Urban Renewal and funding that the Bureau of Public Roads does is completely diff nt. You understand that? A. That the source of the funds is different?

Q. No, it all comes from the federal government. A. From us.

Q. I am talking about the mechanical processes. You understand that. A. Different line in the budget.

Q. No, let me start over again. You understand in building a highway and the approval of it by the Bureau of Public Roads we are relying wholly upon the local Road Commission or the State Road Commission. You understand

that. [260] A. I don't think I understand it quite in the same way you would put the question to me, that as the federal agency, if you are talking from that point of view, has the responsibility for the disbursement of money, but I don't get the understanding that the federal agency has a responsibility not to be responsible how the money is being disbursed.

Q. Who builds the roads? A. That function is with review the function of the state agency.

Q. Does the State of West Virginia have any authority to build public housing? A. Yes, it does.

Mr. Davidson: Objection.

A. As a matter of fact, I think the state does have.

The Court: Just a minute. This dialogue is very interesting but it is entirely academic as far as the Court is concerned.

Mr. Upton: All right, your Honor. Let me move on to something else.

Q. In Plaintiffs' Exhibit Number 23 as I understand it this was based upon the 1960 census. Is that correct? A. That's correct.

Q. And you are aware since those figures were prepared that the City of Charleston has passed an open housing law? [261] A. I understand the passage was last year, wasn't it?

Q. I was going to ask you if you know the date. A. Let me think. I think it was 1968; if not '68, in the last two years, I would say.

Q. Mr. Abeles, your opinions that you have given here today to the plaintiffs are based upon these various ex-

hibits which you have in front of you. Is that not correct? That's 16, 17 and 18. A. Those plus other documents plus I think what is very important, I think some personal direct experience of the city physically, meetings with literally hundreds of people in the course of the last nine months. I would not say it is just the documents, no.

The Mayor's statement that these documents are incomplete, I can appreciate that. The facts that are there I used, but I think a whole lot of the knowledge that I have is from a day to day going relationship. I counted up the other night. I have spent more than thirty professional days in the last nine months on Charleston and Charleston related matters.

Q. You were working on this as well as the Urban Renewal Project? A. That's right, sir.

Q. But you have not conducted any house to house canvass in regard to housing in the Charleston area; I assume [262] you are relying, to be perfectly frank, on these documents. Isn't that correct? A. No, I have checked some of them out in the field. I have actually gone out and surveyed on one occasion some housing in the proposed—I think it was the hospital project because I felt the documents would not be as accurate—I had some doubts about the accuracy and I went out and checked them.

Q. Did you find them to be inaccurate? A. No, I found them to be accurate.

Q. How big a survey did you conduct? A. In that instance I think it included around four or six city blocks and some 87 units, something in that order of magnitude.

Q. And in what general area of the city was that? A. This was—can I read the map, your Honor? I'm not that familiar that I can pick it out again. This is the area from Morris and Washington Street, Elmwood, Lewis, just be-

low a large warehouse there below Smith Street, and a series of housing there.

I have also I might say looked at every home in the Triangle and most of the hollows, most of the hill areas I have looked at pretty closely.

Q. And that was a door to door canvass? A. A door to door review. I didn't go knocking on each [263] door, no.

Q. Just as a point of reference, I take it from your reading of 80-1-68 and the 1968 Highway Act you recognized rather quickly that the Bureau of Public Roads' authorization for payment for relocatees was much higher than HUD's. Is that correct? A. Much higher than HUD's?

Q. Yes. A. No.

Q. They are the same? A. I think so. The public documents I read just offhand were the same. My office is being displaced by the interstate highway through New York and I have become reasonably knowledgeable in that particular field. I think some of them are, really. The DOT moving expenses I think are tighter than the Renewal.

Q. What are the moving expenses for Renewal?

Mr. Davidson: Your Honor, we have excluded the area of payments.

The Court: He is testing his knowledgeability about those. I think it is proper for cross-examination.

A. Anyone referring to the documents, which I hate to do at this hour, my stomach being rather empty and my recollection being somewhat strained, but I think the standard [264] is 300 on moving. Under DOT I think it is 200. I'm not sure. Business relocation your maximum is 25,000 and I don't think there is a maximum any more under HUD for relocation on business expense.

Mr. Upton: That's all.

The Witness: Well, I gave you my opinion. I would be delighted to look it up for you. I am quite sure of the last one.

The Court: Anything further?

Mr. Hunt: I have a couple of questions, your Honor.

Cross-Examination by Mr. Hunt:

Q. From your studies, Mr. Abeles, have you ascertained or determined the exact number of persons that will be replaced or displaced by the interstate routing through the Triangle area? A. I can give you the city's estimate, which is 1,098 families. 1,098 familes was the city's official estimate for total highway displacement from 1966 to 1971 in the—

The Court: He was asking you about the Triangle.

The Witness: No, the question was, sir, for the entire road system: I'm sorry. Under the Triangle I couldn't break that out of the entire system.

Q. From 1966 to 1971 some place you arrived at a figure [265] of 1,098 families? A. I didn't arrive at it. The CRP arrived at. I am merely quoting.

Q. Do you know as of this date how many of this 1,098 families have been displaced and relocated? A. No, I do not.

Q. Where did you obtain your figure that we have lost 1900 units of housing since 1960? A. The exact reference would be draft report Community Renewal Program—I have the cite here. Can I refresh my memory? Section IV

page 6 of the Community Renewal Program, City of Charleston. Highway construction would take 1,094—I'm sorry. This is 1,094, Urban Renewal would take 755 of it, Capitol expansion would take 280, and disasters, condemnations and conversions would take 750. Total displacement of family units 1966 through 1971 of 2,879 families.

Q. I have either forgotten what my question was or it wasn't responsive. My question was where did you obtain the information that we had lost since 1966 1900 housing units? A. The same cite. I will give it to you exactly. If you would like to take my word for it, it came from the identical study. Here I have it on page I-7.

Q. As a practical matter or as a factual matter maybe I should say, in the ensuing three years from '66, '67, '68 [266] and so far in 1969, do you have any knowledge of any families being replaced by Urban Renewal? A. Uh huh.

The Court: Replaced or displaced?

A. Government square project, Summers Street project; not the State Capitol complex. That wasn't Urban Renewal. That was state action through condemnation. I think you have got two you have lost through renewal. That's right.

Q. Since 1966? A. That's correct.

Q. Do you know how many families? A. No, I don't know the exact number.

Q. What was the figure on displacement by disasters? A. More precisely it is disasters which are fires and floods, condemnations, which is state action, tearing down buildings estimated to be 150 dwelling units per year. That's the yearly rate, and it is also—I should note this estimate is being conservative, which is one-half rate of the rate of such loss of housing in previous years prior to that so

losing in the city about 300 units through disasters, condemnations and conversions, but for the purpose of this estimate the city was somewhat conservative and halved that figure.

Q. By condemnation do you mean because of unfit housing? [267] A. That could be one of the causes, but a state highway not in the federal system would be a condemnation taking. A park would be condemnation.

Q. Have you done any research or checking as to how well these predictions have held out so far in the 1966 to 1971 period? A. I have checked them against other phases of looking at the problem and I think they are very reasonable. For instance, the disasters, condemnation, conversion, which is the dropping out of units at the bottom of the housing ladder, I think the general figure of two percent of the general housing stock a year gets taken out. That means the housing fifty years old and you have got a housing stock of 28,600 currently.

You take two percent of that, that's roughly 600. You have got a conservative estimate of only 150. I would think these are reasonable ball park figures and certainly the planners had all the figures in front of them to make an exact count of the number of units.

In fact, those figures are built up from other sources in here on a project by project basis, so we could check the validity of these quite clearly. I think they gave us a source for the figures for the highway, the state highway.

Q. But you don't know how many of the 1,098 families [268] to be displaced by the highway have been displaced? A. No, not an exact number. I can venture a guess.

Q. Can you tell us whether or not those that have been displaced have been relocated? A. Pardon me?

Q. Can you tell me whether or not those that have been

displaced by highway construction have been relocated? A. I cannot tell you.

Q. The 1900 units of housing that we have lost in the Charleston area since 1960, do you know what proportion or percentage of those 1900 units was lost as a result of highway construction? A. I think I can find it for you if you like. The loss was 1960-66. It isn't current. That's a loss of 1900 units in six years. I would have to check it for you. My own notes, which were an abstract, didn't take that.

Q. Do you know of any people that were displaced by highway construction that are now wandering around with no homes? A. No, I don't.

Q. Then there is an assumption they were relocated some place? A. That's an assumption you are making. I wouldn't make the same assumption necessarily.

[269] Q. What other assumption could you make? A. That they had to leave town because there wasn't any housing.

Q. They are some place. A. That's right, or they doubled up with other families.

Q. Mr. Abeles, is it your opinion that it is an impossibility for the State Road Commission of West Virgina to relocate the individuals to be displaced from the Triangle area in the City of Charleston in adequate, safe, sanitary and decent housing within the City of Charleston in compliance with the requirements of Chapter 5 of Title 23 of the United States Code? A. Well, sir, if we all had our druthers and nothing else was happening I would agree with you, but taken in terms of a broader context in terms of time and events I would not agree with you.

Q. What else is happening at this time? A. Well, at this time and with the time period of this highway, con-

versions, demolitions will continue. The Urban Renewal Program will probably go forward and continue. Other projects which remove housing from the low and moderate income families will continue.

I would pretty much resist the temptation to change [270] the notion that in the '66 to '71 period we are not going to lose 2800, 2900 units of housing. My contention would be out of that number about two-thirds, roughly 2,000 of those units will be housing presently occupied by low to moderate income families.

You take such an amount of housing out of the city's housing supply and fail to add anything to it, you might be able to take care of those few families that live in part of this but you won't be able to handle the problems of highway relocation pursuant to the Highway Act. I don't think you can do it.

Q. You are speaking now of the entire Charleston area? A. That's right. I think it is a mistake to think of this happening in a vacuum. This taking does not occur in a vacuum.

Q. Were you present in the courtroom when the Director of the Charleston Public Housing testified as to vacancy rates in public housing alone here in Charleston? A. Yes, sir, I was.

Q. You would disagree with his statement that in thirty to sixty days in public housing with the priority situation as it now stands he could absorb all the people in the Triangle area that are being displaced? A. If I was asked the same hypothetical question as [271] he was asked—and I followed the question quite closely—the answer would be identical. However, if you ask in reality what could you do I would come up with a different answer. Remember that you are fifth on the waiting list.

Q. Theoretically. A. Not theoretically. In fact. As the Court pointed out, I am not an attorney but this is an official document of the Housing Authority of Charleston and people who have first priority are people who have been displaced by disasters, fires and floods.

Knowing the history of this city, fires and floods are not uncommon, in addition to which we didn't get into that vacancy rate quite in detail. Remember that people who are moving out of public housing, who are giving it this fantastic turnover, are not people whose incomes have increased. There isn't a great increase in income in the situation. They leave public housing because they hear of an opportunity in private housing. West Virginians in particular do not like the problems associated with living in public housing. If they have an opportunity, they move out.

However, very often that house may have problems. It may disappear because of a highway project so they come back in. What you have in West Virginia is a very unique situation. You may have a thirty percent turnover rate but [272] they are the same people.

I discussed this in the hall because in my professional experience I have never heard of it before and he said what happens is that people who move out also come back in. A real vacancy rate occurs when people move up and out of public housing and can't get back because their incomes have increased. This does not occur here. Incomes have increased 35 to 38 percent, and given inflation that's nothing.

To come back to the question, in the best of all possible worlds with nothing else happening you could take care of the relocation for this strip in sixty days, but I don't think we live in the best of all possible worlds.

Q. Other than disasters what at this time is there that

is higher than people being displaced by the public roads on the priority list in Charleston? A. Site for new public housing.

Q. Are there any? A. There is a number of them that he suggested are actively being pursued, five sites.

Q. Are people as of now being displaced that you know of? A. No.

Q. As I understand it Charleston has not a plan that has been approved for any public housing. [273] A. No, that's not a fact. It doesn't have a workable program. It may have plans for public housing, and it does.

Q. As I understood the housing director, he said on April 23 of this year something was being confirmed or consummated that would also be a low cost housing project of leased property of 100 units. A. He said they would take open bids for a turnkey project. First you have to assume that there would be a bidder. Second you have to make the assumption there would be acceptable bids. Because one puts in a bid doesn't mean that the Housing Authority can or must or is able to accept it. Third, you must assume there is a bid and they want and are able to accept it and then we are talking about something that comes into effect a minimum of twenty-four months from the time the bid is opened. The statements about a turnkey building program have to be taken with some caution. There has been no experience here with that.

Q. That twenty-four months, would that include the construction or all the red tape getting it ready for construction? A. According to FHA, that should include everything.

Q. Eight to ten months for plans and specifications? A. He said eight months or six months for plans and specifications and something like twelve months for [274] construction.

Q. So even under those circumstances, if the 23 April bids were approved and everything went through hunky-dory, it would be eight months before anyone would be displaced on that project? A. That's correct.

Mr. Hunt: I believe that's all. Thank you.

The Court: Is that all, gentlemen?

Mr. Davidson: Just two questions and I think we can finish with the witness.

Redirect Examination by Mr. Davidson:

Q. Mr. Abeles, in the preparation of a relocation plan for persons to be displaced by the interstate system would it be possible or desirable to separate the displacement of the Triangle area from diplacement throughout the intertate system of Charleston? A. It would not be desirable.

Q. Why not? A. You are back to the same problem. You have got a housing supply which is a closed supply. If you displace people from one source as well as another, both those sources compete for the same amount of supply, and not to recognize in a relocation plan all the demands upon the existing supply of [275] housing is not to produce a good plan in my opinion.

Q. Referring your attention to page 7 of Plaintiffs' Exhibit Number 2, paragraph 7 subparagraph b. subparagraph (3)(b), can you find that? A. Yes, sir.

Q. Is that the provision which requires the State Road Commission to provide an analysis of federal, state and community programs affecting the availability of housing currently in the project area? A. Under that heading Development of Relocation Plan, it is quite clearly pointed out you have to analyze federal, state and community programs affecting the availability of housing currently in operation in the project area.

Q. In your opinion is that a necessary requirement for the preparation of a relocation plan? A. Absolutely.

Mr. Davidson: Your Honor, we are finished.

The Court: Do you have anything, gentlemen?

Mr. Davidson: One minute with counsel.

Your Honor, we did have other witnesses prepared but our feeling at this time is that we would like to rest with the opportunity to produce any rebuttal witnesses in the event that witnesses are called by the defendants. It is our feeling now that the issues have now focused and narrowed to [276] legal ones.

The Court: You understand, of course, that you don't have to have these witnesses all tonight. I assume that they would not be too long. Is that correct?

Mr. Davidson: They are mostly very short witnesses, your Honor. I am trying to make some accommodation to what we think are the time problems that we are under. Might I inquire, I understand we are to complete the hearing by approximately noon tomorrow.

The Court: Yes, but I have learned that we live in hope and die in despair, Mr. Davidson.

Mr. Davidson: Might I inquire of the defendants the number of witnesses that they intend to call?

The Court: I think I would be happy to join you in that inquiry. We want to know, the Court and counsel for the plaintiffs, how many witnesses you gentlemen anticipate at this time calling tomorrow.

Mr. Upton: Your Honor, I would like to have an

opportunity anyway to try to reconstruct today's activities before I be drawn to a definite commitment.

The Court: We aren't asking for a definite commitment. We are reasonable men.

Mr. Upton: I would say from my client's standpoint probably two or three at the most.

[277] The Court: These gentlemen have put Mr. Saunders and Mr. Colan on, maybe for all. I don't know; but as I understand you have one more from the Public Roads Division.

Mr. Upton: That's correct.

The Court: Do you have any idea, Mr. Hunt?

Mr. Hunt: Of course, I wouldn't want to commit Mr. Preiser but I would only anticipate about three witnesses.

The Court: Mr. Davidson, you have said you felt you wanted to rest at this time. You mean rest your case, or just rest, period?

Mr. Davidson: Well, certainly the latter. Let me reserve putting on two or three very short witnesses in the morning. I would ask, your Honor, if we may do one thing. There is a document which obviously defendants intend to offer tomorrow as Ritchie's Exhibit Number 1, a purported relocation plan for the Triangle area. I think it would shorten the examination tomorrow if we were to have access to that document, which I assume is a public document.

The Court: I assume it is too. Do you have an extra copy of that, gentlemen?

Mr. Upton: Your Honor, I do not.

The Court: It was in the form of a pamphlet.

Mr. Upton: It is a pamphlet. I don't know whether it has been introduced in evidence or not.

[278] Mr. Hunt: It has been identified. Mr. Colan has one, your Honor.

The Court: You can study it overnight.

Mr. Davidson: Thank you very much.

Mr. Upton: This is the exhibit. There are just two copies of this, one that has been marked as an exhibit and Mr. Colan's copy.

The Court: And as I understand it you are going to make Mr. Colan's copy available to this gentleman to study tonight.

Mr. Upton: I was hoping I could have Mr. Colan's copy tonight, but if that is the Court's request—

The Court: All right. You take the exhibit and hopefully you will bring it back.

Gentlemen, we will convene in the morning at 9:30 and at that time you can advise me whether you want to put on any additional witnesses. I would appreciate it if you would make it as brief as possible because the Court was hopeful of clearing this thing up by noon tomorrow.

(Recess from 8:20 p.m. April 2, 1969, until 9:30 a.m. April 3, 1969.)

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[281] SECOND DAY

Thursday, April 3, 1969

The trial was resumed at 10:20 a.m. pursuant to the recess above noted.

The Court: Good morning, gentlemen. All right, Mr. Davidson, you advised the Court that you might or might not have some additional evidence.

Mr. Davidson: Mr. Lytton plans to put on four short witnesses.

The Court: All right. Call your first one.

Mr. Lytton: Your Honor, before I do that I would like to have Mr. LeRoy Porter released from his subpoena.

The Court: Who is Mr. LeRoy Porter? Do you gentlemen have any objection?

Mr. Preiser: Your Honor, may we have one of our investigators interview Mr. Porter for just a few moments before we consent to a release?

The Court: All right.

Mr. Preiser: He is not a party, your Honor. I checked that.

The Court: All right.

Mr. Lytton: I would like to call Miss Carolyn Tillman back to the stand.

The Court: Miss Tillman. You are still under oath, [282] Miss Tillman.

CAROLYN TILLMAN recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows:

Mr. Lytton: Your Honor, we have another affidavit from Miss Tillman.

Mr. Upton: Your Honor, we cannot hear counsel.

The Court: It makes no difference. Why do you submit affidavits when you have a witness here?

Mr. Lytton: We wanted to have Miss Tillman summarize what was in her affidavit.

The Court: That would be all right, but why do you submit an affidavit? You have got the witness here. Where did you learn that rule of evidence?

Mr. Lytton: Not in law school.

The Court: All right. Go ahead and question the witness.

Mr. Lytton: Thank you.

Direct Examination by Mr. Lytton:

Q. Miss Tillman, you testified yesterday you worked at the Community Resource Center as a part of the Triangle Improvement Council, one of its services to the community. [283] What does your work consist of to a large degree? A. My work consists of organizing residents of the Triangle to participate in certain issues that they may be involved in; also welfare assistance, housing assistance and other types of services that we are able to render.

Q. Relative to this case what kinds of assistance would you provide? A. Housing.

The Court: Did she go into this last night or not?

Mr. Lytton: I'm sorry, your Honor. I wasn't aware that she did.

The Court: She testified last night about these questionnaires and the recap that she had made from it.

Mr. Lytton: We will continue on.

Q. On March 27th did you learn anything significant with respect to the State Road? A. Yes. I went to the State Road Commission relocation office in the Triangle district. I went to the State Road Commission relocation office in the Triangle district in an attempt to obtain a list of the

available housing that they had in order to find housing for some of the residents who had sought aid in our office, housing aid in our office.

Q. Some of those residents had come to the Community Resource office? [284] A. Yes.

Q. You testified that you got a list from the Triangle relocation office of available housing in the City of Charleston. What did you do with that list, Miss Tillman? A. From the list I copied all the available housing and I went back to the office and I made telephone inquiries to find out how many were large enough for families with children, how many were available for low income families, and how many would be available to black families.

Q. And what were the results of your findings, please? Quickly. A. I found from a list of fifty homes, dwelling units within the Charleston area, there were only eight owners who would rent to black families. There were eight homes for $60 per month or less. I used $60 per month or less because I thought $60 was the maximum that a low income family could pay.

Q. How did you arrive at that figure? A. From the survey we discovered—

Q. Is this the survey you brought into Court yesterday? A. Yes; that the average income of the residents in the Triangle was about $170 a month, so I thought $60 was the maximum that the residents could pay. From the listing I also noted that of the eight homes available for low income families only six of the landlords would rent to black families. Out [285] of this six only four were available, were large enough for families with children.

Q. So eight would rent to black families. That leaves forty-two of the fifty names. A. Only six would rent to black families.

Q. That leaves forty-four. What was wrong with the other? A. The other homes were either too much rent per month or they wouldn't rent to black families or they were not large enough for families with children.

Q. Were some of these apartments rented already? A. Yes, some were already rented. From the list there were twenty-eight already rented.

Q. Miss Tillman, did you then prepare an affidavit in support of the testimony you just gave, giving in detail the results of your findings? A. Yes.

Mr. Lytton: Your Honor, if I may, that is the purpose of the affidavit that I had submitted earlier or that I wished to submit earlier, and I would ask you again if I may submit this as a plaintiffs' exhibit and submit it in evidence following that.

The Court: I will permit it to be admitted as collateral to her testimony.

[286] Mr. Lytton: Thank you, your Honor.

The Court: I wouldn't want, in the event this case would go up to the Court of Appeals, for them to feel that I had admitted the affidavit as evidence in this proceeding.

Mr. Lytton: I'm sorry. Thank you, your Honor.

Mr. Preiser: May we see it?

The Clerk: Plaintiffs' Exhibit Number 25 marked for identification.

Plaintiffs' Exhibit Number 25

The affidavit referred to was marked as indicated above and admitted as collateral evidence.

Mr. Preiser: May I see a copy of the affidavit?

The Court: Yes. Let's wait till he finishes with the witness and you can look at it.

Carolyn Tillman—for Plaintiffs—Recalled—Cross

Q. Miss Tillman, could you authenticate this as the affidavit you wrote in support of your testimony? A. Yes.

Q. And identify it as such? A. Yes.

Mr. Lytton: Thank you very much. If the Court will allow the admission of this as evidence—

The Court: Have you finished?

Mr. Lytton: The plaintiff rests.

The Court: All right. Cross-examine.

[287] Mr. Upton: Your Honor, I would move to have her testimony stricken as hearsay in regard to her survey. It is strictly her reporting a conversation with other people and I would ask her entire testimony be stricken from this record.

The Court: I will take it under advisement.

Mr. Preiser: Your Honor, I would move to strike her testimony for the reason it has no probative value in that under the law the people who could not pay the rental she says was too high for them under this relocation law receive from the federal government and the state the difference between the fair market value of what they were paying and what they would have to pay for decent, safe and sanitary housing for up to two years to the maximum of $1500, so that if she did call a place that rented for $80 a month and just because a person can only pay $50, the government would make up the $30 a month for two years, and we think it has no probative value.

The Court: I am going to admit it. Cross-examine.

Cross-Examination by Mr. Preiser:

Q. Miss Tillman, in the affidavit that was submitted as collateral to your testimony and was marked for identifica-

tion Plaintiffs' Exhibit Number 25, I note it was sworn to on the 3rd day of April, 1969. That's today. A. Yes.

[288] Q. And you did not make this affidavit up at the time you made this survey? A. No.

Q. Who asked you to make the survey? A. The survey?

Q. Yes. A. The Legal Aid Society.

Q. They asked you to go down and find out about the available houses? A. No, not this; the telephone inquiry?

Q. I beg your pardon. The inquiry concerning the available housing. Who asked you to do that? A. I did it myself.

Q. Did anyone ask you to do it? A. No.

Q. You did this all on your own? A. Yes.

Q. You said there were eight houses available, only six would rent to black families. Is that correct? A. That is true.

Q. I note on your affidavit a statement here that one woman said that she would have to talk to her husband to see if she could rent to blacks. Do you take that to mean she would not or she would rent to blacks, or did you follow it up? [289] A. If she said she would have to talk to her husband, then I felt that this was clearly discrimination because she probably would discriminate. It was more or less dodging the issue.

Q. You did not follow up to find out after the lady talked with her husband whether she would rent to blacks or not? A. No, I didn't feel it was necessary anyway because the rent was too much.

Q. Here you have a house at 5401 Virginia Avenue where you said Mr. Stone had no objections to renting to black people but he would prefer an older retired couple. Did you consider that a house that would be available to blacks? A. Yes, sir, older retired blacks.

Q. You say houses 1 through 28 on your affidavit had already been rented. Did you know whether or not or did you check to find out if the owners of the houses maybe had tenants who were about to move or they were looking for other tenants? Did you check that? A. From the list, the list was available housing, and I called to see how many —this was—one of the purposes for calling was to see how many were vacant at the time.

Q. What your testimony is limited to is the number of houses vacant as opposed to maybe a house that might be available in two weeks or a month? You didn't check that? [290] A. These had been rented after the time that they were placed on the list of the State Road Commission relocation.

Q. How did you know what time they had been placed on the list? A. I don't know what time they were placed on the list.

Q. What you are saying, isn't it, is that at the time on March 27, 1969 you and another woman called to see if they were vacant or to see if they were rented and that you found these twenty-eight had tenants in them on March 27. That's the extent of your testimony, isn't it? A. Yes.

Q. And you do not know whether or not those houses would be available for tenants thirty days from that date or two weeks from that date or anything else, do you? A. I asked had they already been rented.

Q. Can you tell us if they were rented to people who were displacees from the Triangle area? A. No.

Q. You don't know how long they had been rented for either, do you? A. No, I don't.

Q. I don't want to belabor it, but on this one thing about the twenty-eight houses that you say were already rented, how did you obtain the list of the twenty-eight houses from

the [291] State Road relocation office? Did they give it to you in writing or was it verbally? A. I obtained all of the houses on the list from the relocation office in writing.

Q. Do you have those documents here with you, the written documents they gave you? A. I copied them at the relocation office.

Q. Did they represent to you that those houses were vacant on that day or did they just represent to you that they were available for tenancy? A. Some of them were —I don't understand the question.

Q. You don't understand it. My point is when you went to the State Road relocation office in the Triangle district to find out what housing was available and you say that these first twenty-eight on the list were given to you as available housing and you called and found out that they were not empty, what I want to know is whether or not the State Road Commission when you went there did the people there tell you these houses were empty houses, vacant houses, or did they merely say that they would be available for rental and/or purchase? A. These first twenty-eight?

Q. Yes. A. They were not on the list as the first twenty-eight. They were among the other houses on the list.

[292] Q. I understand, but I am speaking about the first twenty-eight on your affidavit. I want to know whether the State Road Commission told you those houses were vacant or told you that they were available for housing. A. They weren't. The State Road Commission didn't tell me anything. They merely let me read the list.

Q. Didn't it say what this list was supposed to be? A. Available housing for relocation.

Q. It didn't say to you that they were empty at that date, did it? A. That they were empty? No, it didn't say that.

Mr. Preiser: That's all; thank you.

The Court: Any questions, Mr. Upton?

Mr. Upton: Just one moment.

Cross Examination by Mr. Upton:

Q. Miss Tillman, as I understand your testimony or your testimony on direct examination, you indicated that you went to the relocation office at the instance of someone that came to you for help. Is that correct? A. Yes.

Q. Who came to you for help? A. Miss Helen Rinehart.

Q. Miss Helen Rinehart? [293] A. Yes.

Q. Who else? A. She is the only person that came directly to me.

Q. So it was Miss Helen Rinehart. Is she a resident of the Triangle area? A. Yes.

Q. Pardon? A. Yes.

Q. She was looking for assistance in obtaining a suitable place to move, I take it. Is that correct? A. Yes.

Q. And that is what precipitated your visit on March 27th, 1969? A. Yes.

Q. You found on that day fifty houses. Is that correct? A. Yes.

Q. And you found twenty some that were not available, as you indicated, but you did in fact find one for the lady you were attempting to assist. Is that correct? A. No.

Q. There was nothing there for her? A. Nothing.

Q. She found six which were under $60; she found eight that were rentable to black people. I take it she was a Negro. [294] Is that correct? A. Yes.

Q. Six or eight available for Negroes, six under $60 and four that would accept children, and there wasn't one for her? A. No. Out of the four that she could—that would be—that she would be able to rent there were only—there was only one.

Carolyn Tillman—for Plaintiffs—Recalled—Cross

Q. That was available for her? A. Yes.

Q. You had one client and you found one house for her? A. She didn't rent the house.

Q. Now, Miss Tillman, are you familiar with the rent supplement provisions of the 1968 Highway Act?

Mr. Lytton: I object, your Honor. This is purely out of the scope of direct.

The Court: What was the question?

Mr. Upton: I asked her if she was familiar with the rent supplement provision. She has testified here in regard to how much these people could pay and whether they could afford these particular houses, and I think it is pertinent to establish whether she is familiar with it.

The Court: I think it is.

Mr. Lytton: Your Honor, this witness is no expert [295] on the rent supplement.

The Court: She has testified here. This is appropriate cross-examination.

Q. Are you familiar with the rent supplement provisions of the 1968 Highway Act? A. No.

Q. Pardon? A. No.

Mr. Upton: That's all.

Mr. Preiser: Your Honor, now that we have found out something about Miss Rinehart, may we ask some additional questions?

The Court: All right.

Cross Examination by Mr. Preiser:

Q. Miss Tillman, was it a fact that eleven people were living in Miss Rinehart's house in a five room house? Was

that the situation involving Miss Rinehart? A. I think it was eleven people.

Q. And in a five room house? A. Yes.

Q. Were you trying to find a house that somebody would take her with five rooms or were you trying to find a house that was really big enough for eleven people? [296] A. I was trying to find a house that Miss Rinehart would live that she could afford.

The Court: That doesn't answer his question. Were you trying to find a house with five rooms or a house that would accommodate eleven people?

The Witness: A house that would accommodate eleven people.

Q. Do you know whether or not Miss Rinehart found finally a house and moved? A. She hasn't moved. As of today she hasn't moved.

Q. Has she found a house to move to? A. I don't know that.

Q. You don't? Didn't you find a house that was satisfactory for Miss Rinehart and Miss Rinehart refused to move there? A. No.

Q. You didn't find a house for her? A. No.

Q. Did you know that on February 25th, 1969 the relocation officer for the State Road Commission went to Miss Rinehart's home and found her suitable housing and accommodations at a rent she could afford at the Orchard Manor Public Housing Development here in Charleston?

Mr. Lytton: Your Honor—

[297] The Court: What do you want?

Mr. Lytton: I object to that question.

The Court: He hasn't even finished the question.

Mr. Lytton: I'm sorry.

The Court: Rephrase the question, Mr. Preiser.

Q. Did you know that on February 25th, 1969 the relocation officer for the State Road Commission relocation office had gone to Miss Rinehart's home and advised her that they found a vacant apartment for her in Orchard Manor, a public housing development here in Charleston, of satisfactory size and rental within her income and she refused to move there? A. No, I didn't know that.

Q. You didn't know that? A. No.

Q. Did you ask Miss Rinehart what if anything the State Road Commission relocation office had done for her? A. I was aware that Miss Rinehart had found a house on Maryland Avenue and she had run into problems of discrimination from the listing that she received from the State Road Commission.

Q. Are you saying the people on Maryland Avenue wouldn't rent to her? A. Yes.

[298] Q. You knew about that one. Did you know anything at all about what the State Road Commission relocation people had done for her? A. No.

Q. Your answer to that is no? A. Yes. No.

Q. Did you know that on March 25th, 1969 Miss Rinehart advised the relocation office that she had found a place to move to on Bibby Street and planned to move in the middle of the week? A. No.

Q. Was your first meeting with Miss Rinehart on the 27th of March? A. No.

Q. When was it that she asked you for this help? A. It was the day that she went and received—I don't remember the exact date.

Q. Would it have been a week before the time you made

your call to the relocation office? A. It may have been two weeks prior to the time.

Q. So that the facts could well have been at the time you went to the relocation office, which you told us was for the purpose of helping Miss Rinehart, that she had already found this house on Bibby Street? [299] A. You said she found a house on Bibby Street on March 25th?

Q. Yes, and you said you went to the relocation office on the 27th. A. Yes, but I wasn't aware that she had already found a house.

Q. After she came to you for help you might have waited as much as two weeks before you went to help her? A. Because this is not the only thing I did to try to help her find a house.

The Court: What else did you do?

The Witness: We have on the staff of the Community Resource a housing aide and I informed him that Miss Rinehart was looking for housing and asked him what could be—what he could do to help her find housing.

Q. I am just curious about one other thing, Miss Tillman. You said that some of the houses were not large enough for large families. Some of the families were consisting of eight, nine, ten, eleven people. What size houses were you looking for large enough to fit those families? A. Just a minute, please. I said those families with children. I was looking for a home with more than one bedroom at least.

Q. Looking for two, three and four bedroom homes? [300] A. Yes.

Q. And none of those had them? A. Only eight from the list. Six. Four were available, were large enough for families with children.

Q. Did you check at all for available apartments with three or four bedrooms available? A. I checked the dwelling units. Some of these are homes, some are houses, some are just one room.

Q. My question is did you check, say public housing? Did you check that and see how many would be available on a priority basis to people that moved from this area, with two, three and four bedrooms? A. No, because people are not desirous of public housing.

Mr. Preiser: That's all, your Honor. Thank you.

The Court: All right; step down.

(The witness was excused.)

The Court: Your next witness.

Mr. Lytton: We will only call one more witness, your Honor, Miss Geraldine Jordan.

The Clerk: Will you please state your name?

The Witness: Geraldine Jordan.

GERALDINE JORDAN called as a witness on behalf of the plaintiffs, being first [301] duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytton:

Q. Would you state your full name and address, please? A. Miss Geraldine Jordan, 720 Bullitt Street.

Q. Do you rent a room at 720 Bullitt Street? A. Yes, I do.

Q. For the record, you are a Negro female? A. Yes, I am.

Q. Do you have any children? A. One. I have a daughter four years old.

Q. Who owns the property that you live on now at 720 Bullitt Street? A. Well, the State Road owns it now.

Q. Did the State Road Commission or any of its agents say anything significant to you about a month and a half ago? A. Well, a Mr. White and Mr. Hall came around and approached me and told me that I should try to find a place for me and my daughter because they were going to tear that place down, they think about the 7th of this month that place was supposed to be torn down and they think I should try to find me a place for me and my child to stay.

Q. Did they say you had to be out of that residence by the 7th of April? [302] A. That's the way I took it. They said they were going to tear it down by the 7th of this month.

Q. Has the State Road Commission offered you any help in finding a new place after they gave you this notice? A. No.

Q. Before they gave you this notice did they give you any help? A. No, they didn't.

Q. Did they ask you to come to their office at all to give you some information? A. No, they didn't.

Q. Did they ever give you any pamphlets on relocation housing? A. No.

Q. Did they tell you anything about available public housing? A. No, sir.

Q. They didn't tell you anything about the priorities of displacees, people like yourself, who have priority in public housing? A. No.

Q. Did you volunteer on your own to go to the State Road relocation office at that time? A. During that time I have been ill for quite a while [303] and I got sick and had to go to St. Francis Hospital and I stayed over there for a while.

Q. You were in the hospital? A. Yes, I was.

Q. When did you get out of the hospital? A. I have been out now about two weeks recuperating.

Q. Have you found anything to move into by the 7th of April? A. No, I haven't.

Q. Do you know what is going to happen to you? A. That's what I am worried about. I really don't know which way to go and it's hard to find a place with a child.

Mr. Lytton: Thank you very much.

The Witness: I don't want to stay in a room.

Mr. Lytton: Thank you very much. Your witness.

The Court: Cross-examine.

Cross Examination by Mr. Upton:

Q. Your last name is Jordan. Is that correct? A. Yes.

Q. I believe you testified you have one daughter. Is that correct? A. Yes, I do.

[304] Q. And your testimony is that, I take it, the State Road Commission has already purchased the house you are living in. Is that correct? A. They have.

Q. Did you own the house? A. No. I was subrenting from a lady named Mrs. Nichols.

Q. Mrs. Nichols? A. Yes.

Q. Where does she live? A. She lives up on—I have forgotten. It's a state store on Washington going toward the Capitol. What is that little street?

Q. In that general area would be sufficient. I was just curious. Who was it you indicated came down to talk to you from the State Road Commission? A. A Mr. White and a Mr. Hall.

Q. Mr. White and Mr. Hall? A. Yes.

Q. And they indicated to you that the State Road Commission had purchased your home? A. Yes.

Q. And that they were going to tear it down. Is that correct? A. Yes.

[305] Q. You are familiar with the fact that there is a relocation office in the Triangle area, are you not? A. Yes, I am.

Q. And you know that that office has been open for some time. Is that correct? A. Yes.

Q. Have you ever gone to their office? A. No. I taken ill and went to the hospital. I have been sick for about two years and a half and I had a relapse.

Q. How long has the state owned this house? A. They bought it while I was in the hospital last month.

Q. They bought it when you were in the hospital last month? A. That's when my landlady came then and notified me that they had bought the house.

Q. Did Mr. Hall or Mr. White at any time threaten to throw you out in the street or anything of this nature? A. No, they didn't.

Cross-Examination by Mr. Preiser:

Q. Miss Jordan, how old is your daughter? A. She is four years old. She will be five June 24th.

Q. As I understand you, you said after you got out of [306] the hospital you have not been down to the relocation office. A. No, I haven't.

Q. But two men came over to see you and told you you had to get out by the 7th of April? A. They told me before I went to the hospital.

Q. Before? A. Yes.

Q. How long before? A. It was about three or four days before I went in the hospital.

Q. About what date would that be? A. I really couldn't tell you that.

Q. Did they tell you you had to get out or did they tell you they would like for you to find a new place by that date if you could? A. They said they would like for me to find another place.

Q. If you could? A. If I could.

Q. Did they tell you they would help you if you needed help? A. No, they didn't tell me that.

Q. Did they tell you you could go to the relocation office? [307] A. Yes, they did. They told me where it was located.

Q. That's these two gentlemen told you where it was located. Did they also advise you you might get some assistance there in helping you to find a place to go? A. Yes.

Q. But you did not go there? A. No, I was sick. I took ill and went to the hospital.

Q. After you got out of the hospital, which as I understand is about two weeks ago— A. Yes.

Q. —did you go back to your home to stay there? A. Yes, I did.

Q. Were you able to get out and get around so that you could have gone to the relocation office? A. No, the doctor advised me to stay in for a while.

Q. How many days has it been that you have been able to go out that you could go over there? A. Oh, about three days.

Q. Has anybody advised you not to go to the relocation office or not to seek assistance? A. No, they haven't.

Q. So that in the last three days that you have had time to be out you have not been there, so you don't know what help they might be able to give you? [308] A. That's right.

Q. But you did know there is a place to go and you were advised they might be able to help you. Is that correct? A. Yes.

Q. Did they give you any written notice that you had to be out of the house by any certain time? A. No.

Q. Mrs. Jordan, how long have you lived in the house from which you are going to have to move in the Triangle area? A. I moved there in December, around about the first part of December or the middle part.

Q. This past year? A. Last year.

Q. 1968? A. No.

Q. 1967? A. 1968.

Q. You have been there less than a year? A. Yes.

Q. You have only been in that house four or five months? A. Yes.

Q. Is it a house or is it an apartment? A. It is a house. It has eight rooms and a bath.

Q. You live there alone with your daughter? [309] A. Yes. I just have one room in there.

Q. You lease one room in the house? A. Yes.

Q. What about the other seven rooms? Are they occupied by one family? A. No, there's just two more people, two more roomers there. An elderly lady lives in the back and the lady what owns the property, her daughter has two rooms there and she has a kitchen. Her daughter has the two rooms downstairs and the kitchen. I have one room upstairs and the elderly lady has one room and that's next to the bathroom.

Q. How many people total live there? A. It's just five of us there now with my daughter.

Q. Five there now? A. Yes.

Q. How many were living there earlier when you moved there? A. Two more elderly people, and which they moved out.

Q Made about seven? A. Uh huh.

The Court: Do you know where they moved to, Mrs. Jordan, the two elderly people that moved out?

The Witness: No, I really couldn't tell you.

The Court: Where did you live before you moved [310] there in December?.

The Witness: Down at Institute with my sister. I used to live on Christopher Street and the Water Company bought that and I moved to Institute with my sister and I moved from my sister's up on Bullitt Street.

Q. Your landlady's name was what? A. Mrs. Nichols, Violet Nichols.

Q. Didn't she have another house she was going to move to and wanted you tenants to go with her to the other house? A. Yes, she did.

Q. And you didn't want to go? A. No, because her daughter—she has her daughter as overseer and her daughter and I don't get along together.

Q. Her daughter was overseer in the house where you were? A. No, she is not the overseer there.

Q. Was she the overseer when she lived in the house? A. She was there when I first moved there but I called her up because we had a few words and I called her mother up and her mother came and started collecting rent from me.

Q. And when Miss Nichols moved to this other house she did invite you to come along? A. Yes, but she gave her daughter as the overseer and gave her first choice to pick out the rooms and things. She [311] was going to let her daughter take all the downstairs and put my daughter and me upstairs where she could fall over the bannister. Why couldn't I pick me a room downstairs to live in?

Mr. Preiser: That's all.

The Court: Is that all, gentlemen? You may step down.

(The witness was excused.)

The Court: Anything further?

Mr. Lytton: We rest our case.

The Court: The plaintiffs rest.

Mr. Preiser: Your Honor, we would like to renew the motions on behalf of Mr. Colan and Mr. Ritchie. I would like to renew them, if your Honor wants to hear the argument.

The Court: No, I am aware of the motions. Do you want to restate them?

Mr. Preiser: We want to move the Court to dismiss the complaint filed in behalf of the plaintiffs and move the Court to refuse the new motion that was filed on this past Monday for a preliminary injunction, and we want the Court to grant—

The Court: What is the purpose of that new motion, gentlemen?

Mr. Davidson: It was to clarify the relief we [312] requested from the Court.

The Court: I see. All right.

Mr. Preiser: We move the Court again to grant the motion to dismiss on behalf of Mr. Colan, Mr. Ritchie and Mr. Hamill.

Mr. Upton: Your Honor, on behalf of the defendants Volpe and the other federal agencies involved I would like to move that this action be dismissed and that the temporary restraining order be denied at this point for the following reasons:

Number one, in regard to the motion to dismiss certainly the evidence in regard to laches applies in

regard to location of this highway. There has been no evidence presented concerning that by these parties plaintiff. We would respectfully request that the Court rule that issue completely out of this lawsuit at this time.

Secondly, as a second ground for denying the preliminary injunction and the other matters, your Honor, there isn't even one scintilla of evidence in this record at this time of any discrimination on the part of my clients or, as a matter of fact, on the part of the State Road Commission either in the placement of this road or in the way the relocation program is being handled.

In addition to that, your Honor, we feel that this [313] lawsuit is premature because no damages have been shown by the parties plaintiff. There isn't one scintilla of evidence in this record of harassment on the part of the State Road Commission, threats or abuse on the part of the State Road Commission to evict parties. The lawsuit is completely immature and in addition to that we feel that the parties plaintiff in this lawsuit have not demonstrated any standing to bring this particular lawsuit. I think those are basically the grounds, your Honor, and no irreparable harm has been proved.

Mr. Jones: Your Honor, on behalf of the city I would move that the city be dismissed; first, there is no evidence that the city has done anything or failed to do anything. There has been no evidence whatsoever in connection with the city in this proceeding so far.

The Court: The plaintiffs seem to feel that the city is acting in concert and with tacit acquiescence relative to this project, Mr. Jones.

Motions Denied

Mr. Jones: I might point out, your Honor, that the city being a creature of West Virginia statute, can only do what is permitted to be done by statute and we have no statutory authority to do anything as far as this is concerned. We are strictly a creature of the statute and we have no authority to do anything. There is no West Virginia law that [314] permits us as such to participate in this thing.

Mr. Davidson: Your Honor, in connection with the city's position in this litigation, I am sure it is shown from the ordinances of the city that it will have to act to close streets in order to make construction of this highway possible.

The further reason for retaining the city is that it enjoys the position of being able to provide a remedy to the harm which will be caused by the dislocation with the provision of relocation. The city can contract in various ways with federal authorities to construct housing. Therefore, I believe it is appropriate to retain them in the case. We generally oppose the motions at this time, your Honor.

The Court: The motions will be denied. Are you ready to go forward, gentlemen?

Mr. Preiser: We are ready to go forward unless your Honor wants a recess.

The Court: Go ahead.

Mr. Preiser: Mr. O. R. Colan.

The Court: You are still under oath, Mr. Colan.

O. R. Colan—for Defendants—Recalled—Direct

O R. COLAN recalled as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified further as follows:

[315] *Direct Examination by Mr. Preiser:*

Q. Mr. Colan, I think it has been stated already that you are the Director of the Right of Way Division for the State Road Commission. A. Yes, sir.

Q. I don't believe anyone went into your qualifications, did they? A. No, sir.

Q. What is your occupation or profession? A. Attorney.

Q. Mr. Colan, are you duly licensed to practice law in the State of West Virginia? A. In the State of West Virginia and District of Columbia.

Q. Would you tell us from 1948 what your qualifications have been insofar as highway work and relocation work is concerned and right of way? A. From 1948 to 1952 I was an Assistant Attorney General for the State of West Virginia, for the State Road Commission, and assistant to the head of the Right of Way Department at that time, chief right of way engineer.

Q. What were your duties? A. All legal matters, condemnation proceedings.

[316] Q. Right of way acquisition for roadways? A. Yes, sir.

Q. Go ahead. How long long were you in that position? A. About four or four and a half years.

Q. Then what did you do? A. Then I was Chief Right of Way Agent for the West Virginia Turnpike Commission from its inception until the time it was completed. After that—

Q. In regard to the building of the turnpike did your

duties consist again full time in the law and acquisition regarding right of way? A. Yes, sir.

Q. Then did you go with the federal government following that? A. Yes, sir. I was Right of Way Officer for the federal government in Pennsylvania.

Q. What department of the federal government? A. Pardon?

Q. What department of the federal government? A. U. S. Bureau of Public Roads. It was then under the Department of Commerce.

Q. What were your duties as right of way officer insofar as right of way acquisition of lands in West Virginia was concerned or other areas? [317] A. It was general supervision from the federal viewpoint of the land acquisition program, including relocation.

Q. Were you assigned by the federal government to any particular problems involving land acquisition in West Virginia? A. Yes, sir. At the time of the Blatnick Committee hearings in West Virginia I was asked to return to West Virginia as right of way officer in the West Virginia office. That was about 1961, I believe.

Q. Still with the federal government? A. Yes, sir; with the federal government.

Q. How long did you serve in that capacity? A. About one year.

Q. Following that where were you placed and at whose request? A. I became Director of the Right of Way Division of the State Road Commission of West Virginia.

Q. Was that a joint request of the federal government and state? A. That's my understanding.

Q. Since you have been Director of the Right of Way Division of the State Road Commission of the State of West Virginia have you been in charge of acquisition of all West

Virginia property involved in these two projects? [318] A. Right of way, relocation of utilities, relocation of people, public hearings, other related matters.

Q. Who is in charge of the project here in the Triangle district insofar as the relocation of people who may be displaced by the building of the road? Who is the man in charge of that for the State Road Commission? A. I am the one directly responsible for it.

Q. Mr. Colan, do you hold any positions with land acquisition associations in the United States? A. Yes, sir.

Q. How many associations are there in this country that deal with land acquisition? A. Three.

Q. And what position do you hold with all three of those? A. I am Chairman of the Right of Way of the American Association of State Highway Officials, Chairman of the Highway Committee of the American Right of Way Association and Chairman of the Land Acquisition Committee of the Academy of Arts and Sciences Highway Research Board in Washington, D. C.

Q. Insofar as Congressional action and the passage of this law we have been talking about, the Federal Highway Act of 1968, did you appear before Congress or any of its [319] committees and testify and give evidence concerning this matter, that is, land acquisition and relocation? A. Yes.

Q. As a result of some of your appearances and that type thing did this law finally come into being? Let me withdraw that. You did testify before the committee insofar as the various proposed provisions of the law we are talking about. Is that correct, sir? A. Yes.

Q. What, sir, are you doing on April 21st through the 25th of this year insofar as relocation of people is concerned and highway land acquisition, these problems we

have been discussing in this case? A. We are conducting a one week seminar for all of the state highway officials from all fifty jurisdictions, Puerto Rico and Washington, D. C., all relocation officers and officers determining supplemental payments, in New Orleans under the auspices of the Right of Way Committee of the American Right of Way Association and in conjunction with the U. S. Department of Transportation and their right of way people and with various representatives of the Congressional committees that are now considering legislation which would revise some of these relocation requirements.

Q. What is your affiliation with that meeting? What [320] are you supposed to do there? A. I am Chairman of organizing it and supervising it.

Q. With regard to the West Virginia program of relocation are you familiar with what has happened to that program insofar as being used by other states? A. We are receiving a great many requests for copies of our program from the other states. Under this new 1968 Highway Act there are only four states that have actually qualified and are making payments under it.

Q. Are we one of them? A. We are one of the four. There are about a dozen altogether that believe they are legally and properly able to implement the Act but have not started making payments yet.

Q. Mr. Colan, just so there will be no mistake and we will get it in the record, when did the federal government give its approval for the relocation of the highway where it is presently going through the Triangle district, the two projects? Get the date on the record. A. August 31st, 1964.

The Court: Did they approve both of them on that date?

The Witness: Yes, sir.

Q. Mr. Colan, there has been some question about people in the Triangle area and from these two projects moving. [321] Did you at our request prepare some maps to show where people from this area have moved to and where the housing is available? A. Yes, sir, we have some maps prepared.

Q. They were not prepared at my request. These were prepared for the Bureau of Public Roads? A. No, sir. They are just prepared as part of our general information program, keeping track of housing in Charleston and relocation.

Q. They were not prepared for this lawsuit but in the ordinary course of business? A. Yes, sir.

Q. These are awfully small. Would you, Mr. Colan, show his Honor what has happened with regard to moving and the dates and what these various symbols mean? A. Each map covers six months' segment beginning when we started our first relocations in Charleston in January 1967. The red dots indicate where tenants relocated to, the yellow where owners relocated to, and the green where businesses relocated to. This shows the first half of '67 from January to July 1st and where these people relocated to, predominantly the east end, the west side and up Elk River.

The Court: Those are the places to which they moved?

The Witness: Yes, sir.

[322] The Court: From where did they move?

The Witness: This only includes the people in the city limits of Charleston.

The Court: The whole city limits?

The Witness: Yes, sir. It does not include the 500, almost 600 families we moved in South Charleston, the several hundred in Dunbar. Those are excluded.

The Court: It isn't confined to just the Triangle section but includes that?

The Witness: No, sir, but it includes that.

The Court: All right.

The Witness: The next map shows the second half of 1967 and where the people that were relocated during that half of '67 went, predominantly the west side and east end.

The Court: Is this cumulative with the first one?

The Witness: No, sir.

The Court: This just covers that particular six months' period?

The Witness: Just covers that six months' period.

Q. For the record, Mr. Colan, the areas into which you show the move in the second half of 1967 of people from Charleston, are they predominantly and substantially the same areas that they moved in the first half of 1967? A. Yes.

[323] Q. Moved into, I mean. A. The third map covers the first half of 1968, which shows where people who relocated during the first half of '68 moved to.

Q. Does that map show again in the first half of 1968 that the people who moved in the City of Charleston moved substantially in the same areas they had been moving since? A. Yes, sir. The fourth map shows the last half of 1968 and where families from the Charleston city limits projects moved to during that period, in the Charleston immediate area shown on this map.

Q. Does that again show that people have substantially moved into the same general areas? A. Yes, sir. The great majority are relocating in the Charleston west and Charleston east end areas. This last map shows the first actually two months of 1969, which were winter months, and there are not very many moves in those periods. The moves increase as the weather improves.

Q. Are the moves again in the same general area? A. Yes. This next map shows the totals and where people have moved from January 1st, 1967 to March 1st, 1969. This is a cumulative map showing all of it. Some of the people, we have some that have addresses which you can't [324] locate on the map, so there are a few we really couldn't spot. They are not shown on here.

Mr. Davidson: May I ask a question on voir dire?

The Court: Yes.

Mr. Davidson: Do you have any estimate of the percentage of persons shown on the map in relation to the total number of displacements?

The Witness: In the Charleston area?

Mr. Davidson: Yes.

The Witness: The total of all the maps would show around ninety percent. There are a few scattered—

The Court: Go ahead.

The Witness: The last map shows people that have moved completely out of the Charleston area, people moving to Florida, Tennessee, Texas, and other counties.

The Court: What does this mean?

The Witness: Twenty-eight moved out of state, 68 out of the Charleston urban area, 616 within the urban area total.

O. R. Colan—for Defendants—Recalled—Direct

By Mr. Preiser:

Q. People or families? A. Families.

Mr. Preiser: I would like to make that part of the record, your Honor, and move its admission before I ask some other questions about it; Defendant Ritchie's Exhibit. May we have each map numbered, A, B, C?

[325] The Court: Yes.

Mr. Davidson: Your Honor, may I ask one more question on voir dire?

The Court: Yes.

Mr. Davidson: Does each red circle or yellow circle represent an individual family?

The Witness: Yes.

The Clerk: Defendant Ritchie's Exhibit Number 2-A, B, C, D, E, F and G marked for identification.

Defendant Ritchie's Exhibit 2-A—2-G for Identification

The maps referred to were marked as indicated above.

Mr. Preiser: I move to admit, your Honor, Defendant Ritchie's Exhibit 2-A through G.

The Court: It will be admitted.

The Clerk: Marked for identification and admitted.

Defendant Ritchie's Exhibit 2-A—2-G

The exhibit referred to, previously marked for identification, was admitted in evidence.

Q. Mr. Colan, what is the significance of these things that you have shown on the map showing where people

from the Charleston area have moved from January 1967 and the fact that they are still moving into the same areas as late as March 1969? A. Housing is available in those areas and continues [326] to be on a regular turnover basis and has been since the inception of our moves. The available housing on any one given day has varied very little since we have started actually relocating people in Charleston.

Q. How do you explain the fact that there was available housing in certain areas to which people were moving in early '67 and still there is available housing because people are still moving there? How can you explain that? A. A great many factors affect it; for example, normal upgrading of housing. When a man moves from a $40,000 to a $60,000 house someone moves into his forty from a thirty and a twenty and it keeps going down the line until you have somebody who moves from an $8,000 house to a $14,000 house.

We have a great many older people. We have a lot of retirees from plants who move out of town. They are in better housing usually and people are stepping right up to fill the better housing and each person upgrades himself and it leaves a continual market in most of the ranges.

We have also had a very serious financing condition in the sale of houses which has hurt the market and there are a great many homes available and continues to be with the increased interest rates right now.

The Court: Available for purchase?

The Witness: Yes, available for purchase we believe [327] first because there wasn't any money and our people who were buying had their cash equity and could assume someone else's loan and

could easily repurchase. Now with the interest situation as it is people we are relocating generally have a very substantial equity in their house if they are owners.

Q. What effect, if any, on the available housing market in Charleston has the closing of some of our plants within the last several years had? A. It has caused additional vacancies generally in the rental area; not altogether.

Q. Will you explain the significance of these maps insofar as housing is concerned? You went through the upgrading of housing accommodations. Does that include within it tenancies of houses and/or apartments as well as purchase of houses itself, the area moves? A. Yes, sir.

Q. Have you in addition to that study caused under your supervision and control a study to be made insofar as available housing both by purchase of houses and rental of apartments and rental for single persons in and about the Charleston area that would be available to people living in the Triangle area that will be displaced by virtue of the road as shown on this large map in evidence as Plaintiffs' Exhibit 1? A. Yes, as a part of our continuing study we do have a [328] written report that is current.

Q. This study that I have had marked for identification Defendants' Exhibit Number 1, not yet admitted into evidence, is that upgraded to what date? A. I believe it was February 28, to the best of my recollection, 1969.

Q. With the exception of this crayon marking on the front, my bad habit of marking on the front of it, and a little pencil notation of mine at the bottom of the available rentals, which with the Court's permission I would like to remove—

The Court: All right.

O. R. Colan—for Defendants—Recalled—Direct

Q. With the exception of the crayon mark and pencil marking I am going to mark out, is this document, Ritchie's Exhibit Number 1 for identification, an official report of your office made under your supervision and control? A. Yes.

Q. Indicating the Triangle area relocation plan? A. Yes, sir.

Mr. Preiser: Your Honor, with that we move to admit it with permission to remove my pencil marks.

Mr. Davidson: May I take the witness on voir dire?

The Court: Yes. You had an opportunity to study this last night?

[329] Mr. Davidson: Yes, I did.

When was this report prepared? It is undated.

The Witness: Sometime during February.

The Court: Just a minute, Mr. Davidson. You said you wanted to take him on voir dire, but let's save this until cross-examination.

Mr. Davidson: All right. Could I then reserve any objection as to its admissibility?

The Court: Yes. Go ahead, Mr. Preiser.

Q. Mr. Colan, would you tell us what the move-in turnover rate was for Washington Manor in the year 1967 and the year 1968?

The Court: Tell me what page you are working from.

The Witness: These pages are not numbered. It is about the seventh page.

The Court: Go ahead.

A. Washington Manor, there were 53 turnovers in 1967, 49 in 1968.

Q. Of those 53 in '67 how many were one bedrooms?

The Court: It speaks for itself; thirteen.

Q. And in 1968 you have given us and it shows also one and two bedrooms. Is that the same Washington Manor that the gentleman testified about yesterday? You were present when the Director of the Charleston Housing testified as to its [330] standards? Is that the same one? A. Yes, sir.

Q. That's a public housing development? A. Yes, sir.

Q. Where is it located, sir, in the City of Charleston? Do you know? A. I'm sorry; I can't give you the street address. It is right in this area we are discussing.

Mr. Preiser: Would your Honor take judicial notice of the fact that Washington Manor is located within—

The Court: I don't have to take judicial notice. I have lived here all my life. I know where it is.

Mr. Preiser: For the record I was talking about in case an appellate court reviews it, it isn't far away from the Triangle.

The Court: Yes, sir, and I will take judicial and personal notice of it. Go ahead.

A. It is about two blocks from this project.

Q. With regard to Littlepage Terrace, would you tell us how many vacancy move-in turnovers in 1967 and how many in 1968? A. In 1967 there were 43 and in 1968 there were 49.

O. R. Colan—for Defendants—Recalled—Direct

Q. In Littlepage Terrace those vacancies consisted of one, two and three bedrooms? [331] A. Yes, sir.

Q. And the numbers broken down according to the chart? A. Yes, sir.

Mr. Preiser: With regard to the location of Littlepage Terrace may the record show about where it is, your Honor?

The Court: The Court will take judicial notice of the location of Littlepage Terrace.

Mr. Preiser: How will the appeal court know where it is in relation to the Triangle?

The Court: They would never read the record anyway. Do you want to state for Judge Haynsworth and his associates where it is?

Mr. Preiser: It is on the corner of Washington Street and Patrick Street, isn't it?

The Court: No, it's down at the old Kanawha Two-Mile Bridge and Sissonville Road coming in from Sugar Creek Road. Orchard Manor is on out Sissonville Road. Littlepage Terrace is down at the Littlepage home place, as we old settlers say.

Mr. Preiser: Both in the city limits of Charleston?

The Court: Oh, yes, sir.

Q. And insofar as Orchard Manor is concerned how many vacancy turnovers in the year 1967? [332] A. 1967 there were 149.

Q. 1968? A. 141.

Q. And they included both one, two, three and four bedrooms? A. Yes, sir.

Q. As shown on the chart. Sir? A. Yes, sir.

Q. To recapitulate, totaling the three how many total

move-ins and turnovers in 1967 from those three housing projects? A. 245.

Q. In 1968? A. 239.

Q. And the turnover by bedroom size is shown on the last page? A. Yes.

Q. Did you also cause a study and investigation to be made and contained in this report, available private rentals? A. Yes, sir.

Q. Would you explain to the Court the meaning of these schedules and significance of them insofar as the available private rentals for people in the areas we are talking about? A. It simply shows the rentals that were available on a [333] given day. We keep a continuous uplisting of all the rental properties in Charleston. We inspect them to make sure they are decent, safe and sanitary and we try to keep the records as current as possible. The rentals go on and off every day. This was the list on the specific day he made the report showing the price range and we have them broken down into number of units that were available for rent. His date here was February 24.

Q. Eighty private rental units available? A. Yes, sir.

Q. With regard to single room rentals for single people who have to move from the Triangle district, would you tell us what we have here in Charleston and give us some idea where the various places are located in the city limits with regard to where the Triangle district is, how far away? A. There is a large list. We do not usually list the rooms that are in houses. We try to list the ones in public accommodations.

Q. What about ones in hotels, and give us the average monthly rate.

The Court: He has got them listed: Grant, Du-Pont, Reynolds, Worthy, Lee, Holley and Ruffner.

The Witness: There is one typing error on here. On the Ruffner Hotel, the last line for average rooms today— [334] 154, they mistakenly copied the one from above. The total average instead of 344 is actually 250.

Q. At the time of this report there were approximately 250 average available rooms for single people in an area within a mile of the Triangle district actually? A. Most of this is much closer than within a mile of the Triangle district.

Q. There are that many available rooms? A. Yes, sir.

Q. Within the average rentals as shown in this chart? A. Yes, sir.

Q. Did you make a study and find out what the average monthly rental was being paid by these single people in the Triangle area when they would be removed? A. Yes, sir.

Q. Is that shown in here? A. I believe. I don't remember. Average rent paid, number of rooms; yes, sir.

Q. Where is that?

The Court: It is back a few pages.

The Witness: Back up about three pages.

The Court: That's the one listed "Triangle area—amount of rent paid"?

The Witness: Yes, sir.

[335] Q. Looking at one room, that's seven at $20 to $30, sixty-six at $31 to $40, two and $41 to $50 and one at $71 and up. Is that about right? A. Yes, sir.

The Court: May I ask you one thing? It says total 175 families. Does that mean families or individuals?

The Witness: That means individuals. No, sir; I'm sorry. It means individuals are counted as a family. Families are counted as one. A husband and wife with two children are one and a roomer is one.

The Court: We are back to—what did we call them, gentlemen?

Mr. Davidson: Households.

The Court: Does this represent 175 households, one house, one member household, or do you know?

The Witness: It represents at this time I believe 116 one-member households and fifty-nine families.

Q. A family being two or more people? A. Yes, sir.

Q. You made the studies on available housing for people in the path of the roadways in the Triangle area we have been talking about and you are familiar with Charleston public housing regulations and federal law? A. Yes, sir.

[336] Q. Does that all come within the purview of your duty and responsibility, to know what housing is available for these people? A. Yes, sir.

Q. Tell the Court whether there is any serious problem for relocating the persons in the path of the interstate in the area of the Triangle that we are talking about in safe, sanitary and decent housing in compliance with all the rules and laws and regulations of the 1968 Act and the regulations pursuant thereto in this area with comparable facilities and within the range that they can pay. A. In my opinion there is no serious problem involved in relocating all the individuals and families from the Triangle area in accordance with the new 1968 Highway Act into accommodations that meet all of its specifications.

Q. And all of its regulations? A. And all of its regulations.

O. R. Colan—for Defendants—Recalled—Direct

Q. Are your people having any trouble finding places for those people who want to move? A. No, sir, we are not really.

Q. Would you give us some recent examples of how it functions? How do you function, the service you render these people, and give us some example, tracing it from the beginning up to the time you relocate them, if you will, from [337] this area. A. At the time of the public hearings we first explained what relocation services are available and subsequently contacted the individuals. We used to do it by letter. A great many of these received a letter explaining it.

We sometimes found out that the letter didn't carry it well enough and we follow up and try to get them to sign a little card whether or not they want help. We found out that wasn't too practical because some of them are afraid to sign things, so we follow up with personal contacts.

We established a relocation office. We make a survey of the individual people, where they want to relocate, where they would like to move to, what their incomes are and family types, the businesses where they worked, where they go to church.

Then we keep a continual survey of all the housing that is available for sale or for rent. We keep it updated by a full-time staff. On these two projects we have a total of nine or ten people assigned full time to relocation, including two or three people who do nothing but inspect the rental housing that is available to make sure it is safe, decent and sanitary and conforms to the regulations.

We were doing this for several years before the Highway Act required it. We weren't inspecting them to the [338] same standards required by the regulations as to safe, decent and sanitary.

Q. You do all that? A. We do it on any property that is questionable, that is not clearly obvious. Our regulations provide if it is under an FHA loan we don't have to go back and approve the heating system for the FHA loans. We contact the individual people, advise them that our services are available, offer to help. We show them places that are available for rent. We explain to them how they can get loans to purchase property.

Q. You say you show the places available for rent. How do the people go see them? Do you help them in any way to get there? A. Yes, sir. We pick them up in cars, take them and show them the property. We make arrangements for any deposit they have to make to get in, give them priority certificates if they want in public housing.

If they are moving into public housing and they do not have furniture and it is an unfurnished apartment, we go out and try to arrange to get them free furniture or whatever they can afford. In some cases we have gone to places like the Salvation Army, Mountain Mission and arranged for donations of furniture to move them into the public housing units.

Q. Those are people who were renting furnished [339] apartments? A. They were renting furnished places and to move into public housing we have to go get them furniture to move them in. Then we pay them for their relocation cost. They get a relocation cost of $100 and get this supplemental payment up to $1500, which is the difference between the rent they were paying and the average cost of renting a place adequate for the size of their family meeting the decent, safe and sanitary standards.

We find all the places that are available and average that price and they all have to be decent, safe and sanitary, which puts up pretty high qualifications. They get this

bonus payment even though they move—for example, we moved some families out of the Triangle that were paying $60 and $65 a month rent for rather miserable accommodations plus utilities.

We moved the families into four bedroom housing in public housing where their rent would be $41 or $42 a month, including utilities. We pay them their moving cost and when they are really in dire straits we get a state truck and move them free, even though we give them the money to move.

We collect money from outside sources to help pay for liens on their furniture. We do whatever we can to make a minimum type hardship and get them in good type accommodations [340] and do the best we can for them.

Q. If a person was paying $65 a month in the Triangle plus utilities and you find them a nice four bedroom apartment in public housing for $42 a month including utilities, but if the average value of that four bedroom apartment for $42 a month was worth $80, would those people get back some cash in addition to that? A. Yes, sir. We can only consider in finding the average price that they would have to pay, we can only consider houses that are available on the private market and we have to exclude the cheap public housing that they actually are moving into, so a person with a family of eight or nine, for example, we have to look for a tremendous large size house and some of those would be in $130 or $140 rentals.

They might have been paying $60. They get the difference between $60 and $135 a month for two years as a lump sum payment, even though they move into public housing and get much cheaper rent.

The Court: Why?

The Witness: I don't know. Congress just passed the law. I couldn't explain it.

Q. Mr. Colan, insofar as interference by the Triangle Improvement Council and some of these people here in the moving of people down there, would you give the Court an [341] example of what has happened with regard to some people you found accommodations for and their refusal to move? A. We have found accommodations in public housing for one lady. There were only two families too large for public accommodations. One of those families was living in a rather terrible place. The floor when we bought it was falling through and we had to repair the floor. Sewage was standing in the basement. We had to pump that out and continually keep it cleaned out. The plumbing fixtures didn't work. We have repaired those.

We found her a place in public housing, a four bedroom apartment, got public housing to waive their maximum requirements for her and we were ready to move her when representatives of the Triangle Council advised me they didn't feel she should move in public housing, she should stay where she was, and they encouraged her to stay where she was and she is staying right there.

The Court: When was this, Mr. Colan?

The Witness: Within the last month or month and a half.

The Court: You say representatives of the Triangle Improvement Council suggested that to her?

The Witness: They told me on the telephone personally that they did not feel she should be there and they [342] talked to her and she would not move into public housing.

The Court: That was within the past month?

The Witness: Month or month and a half.

The Court: Since this litigation started?

The Witness: Yes, sir. Yes, sir.

The Court: Did they give you any reason for it?

The Witness: Yes, sir. They said they thought she had too many children to be in public housing, some type of explanation about the number of children she has. I really can't remember the details.

The Court: Do you recall her name?

The Witness: Mrs. Burton.

Q. Mrs. Gladys Burton of 109 North Rand Street? A. Yes.

The Court: All right.

Q. Do you know who it was that you talked to that said they told her not to move? A. I believe it was a Mrs. Cash with the Triangle Improvement Council.

Q. Who? A. Mrs. Cash with the Triangle Improvement Council, who told me she did not feel she should go.

Q. Was she living in a house owned by the State Road Commission of the State of West Virginia in the Triangle [343] district? A. She was living in one that had been acquired by the State Road Commission.

Q. Acquired by the building of this road? A. Yes.

Q. I would like to show you a letter on the stationery of the Legal Aid Society addressed to you signed by Mr. Tom Lytton, staff attorney—these are photocopies, of course—and a photocopy of a letter dated October 30 addressed to Mr. Tom Lytton, re Mrs. Gladys Burton, signed by Mr. O. R. Colan, and with the exception of the red lines someone has inserted are those accurate photocopies from your

official files from the State of West Virginia regarding this matter? A. Yes, sir, with the exception of the three red underlines.

The Court: Do you have some comment?

Mr. Davidson: I would like to see the letter after you are finished.

The Court: The letter is addressed to Mr. Colan. It is on the stationery of the Legal Aid Society. It says: "It has come to my attention that the property on which Mrs. Gladys Burton of 109 North Rand in Charleston is living is owned by the State Road Commission.

"Mrs. Burton came to us with several complaints [344] about the condition of her living unit. A Mr. Ricketts of State Road looked at the property and said that the worse (sic) problem, a trap door about to collapse into the basement, would be fixed. The other problems, specifically the collection of water in the basement filling up one-half of the volume of the basement, and the long grass and weeds, at least chest high, he said he would do nothing about. The basement full of water is good breeding ground for rats and insects. It is not beyond comprehension that a neighborhood child could fall into that basement while 'exploring' and drown.

"We think that the immediate responsibility of the State Road Commission is to drain the water from the basement of that house and cut the grass.

"We appreciate your cooperation and speedy action in helping Mrs. Burton to live in decent, safe and sanitary housing. Thank you. Sincerely, Legal

Aid Society of Charleston; Tom Lytton, staff attorney."

[346] * * *

The answer directed to Mr. Lytton, October 30th: "Thank you for your letter of October 17, 1968, concerning the property occupied by Mrs. Gladys Burton at 109 North Rand Street, Charleston, West Virginia.

"This property was just recently acquired by The [347] State Road Commission." I assume that these conditions existed prior to the time Mr. Lytton wrote this and at the time the State Road acquired it.

The Witness: Yes, sir.

The Court: They had been permitted to exist under the owner who rented to Mrs. Burton?

The Witness: Yes, sir.

The Court: "Every effort is being made to relocate Mrs. Burton into safe, decent and sanitary accommodations. The conditions that you refer to concerning the basement and general condition of the house obviously existed for a long period of time before the property was acquired by the Road Commission.

"Upon learning of the hazardous condition concerning the trap door, the Commission had repairs made within twenty-four hours. Any major repairs to correct the numerous deficiencies in this house would certain cost more than the property is worth and would take longer to complete than the time Mrs. Burton will probably remain in the dwelling. We hope to have her moved into other housing which is safe, decent and sanitary in the immediate future.

"Arrangements were made to have the water pumped out of Mrs. Burton's basement.

"Please advise me if there is any other information [348] that I can supply you in connection with this matter."

I take it you want to offer this as an exhibit.

Mr. Preiser: Yes, sir, and move its admission.

The Court: It will be admitted.

The Clerk: Defendant Ritchie's Exhibit Number 3 marked for identification and admitted.

Defendant Ritchie's Exhibit 3

The exhibit referred to was marked for identification and admitted in evidence.

Q. Mr. Colan, there was a lady testified this morning, a Mrs. Jordan, about a visit from several people in the State Road Commission and I think the sum total of her testimony when she finished was that they would like her to move by the 7th of April if she could. Are you familiar with that situation at all? A. I am not familiar with anyone asking her to move by the 7th of April.

Q. Have you forced anybody to move in this area? A. We haven't forced anyone to move.

Q. What is the policy concerning letting people stay there even after you acquire the real estate? A. All the tenants have been allowed to remain under the same terms and conditions that existed at the time we acquired the property. No one has been forced to relocate. [349] We do offer them relocation assistance. We try to offer them help in showing them where there are properties available. We try to encourage, when we do find decent, safe and sanitary housing that fits their needs and that they like,

that we feel it would be advisable for them to go ahead and accept it once they find something that particularly suits them.

Q. Have you done anything to force anybody out down there? A. No, sir.

Q. There was one thing Mr. Saunders talked about that wasn't made completely clear as far as I was concerned under the law and regulations, and that is a person who does not own a house who lives in the Triangle where the interstate is going to go, what can be done about helping that person under this Act get the money for a down payment and help make the payments on the house after you acquire it for them? A. Two new federal programs are available so that if a tenant wants to purchase a house, the general maximum is $17,000, up to that price. Funds are available to pay part of the interest charges. Generally it is based on pro ration of income, and if the tenant can afford with the money we pay them as a dislocation allowance to make a down payment on the house and can afford to pay the principal and pay one percent of the interest, the federal government through HUD and other [350] agencies will pick up the difference in the interest and other charges on top of this.

There is also a Department of Agriculture fund that's just been made available with $1,000,000 in it for another type of program to help people in rural areas.

Q. The interest here is eight percent on houses.

The Court: Just a minute.

Mr. Davidson: Your Honor, as you ruled yesterday, testimony concerning allowances is outside the scope of the issue which has been defined.

The Court: He is talking about relocation now and certainly any program that would aid in relocating these people is germane to that issue, isn't it?

Mr. Davidson: It isn't germane to the actual availability of housing.

The Court: I think it does have a bearing on it. You may have a seat.

Q. I don't want to take the time and go through each of the provisions of the Act or relocation memorandum IM 80-1-68 or the subsequent amendments, but by way of summary if it would be permitted to me to save time, have you—that is, you acting on behalf of the State Road Commission of West Virginia—complied with each and every one of those regulations so far as they are applicable to this situation? [351] A. The State Road Commission has complied with each of the regulations of the IM 80-1-68 and its amendments on both of these projects that are here involved.

Q. As I understand from Mr. Saunders, everything was complied with regardless of whether it was applicable here or not with the exception of the relocation plan which he said wasn't required under a Circular Memorandum of the federal government dated February 12, 1969. Would this exhibit, Defendant Ritchie's Exhibit Number 1, comply with it insofar as the Triangle district is concerned as a relocation plan? A. In my opinion it is a relocation plan for the families and individuals involved in there, yes, sir.

Q. Is the State Road Commission making all the payments to the people in question that are required by the Act and its amendments? A. Yes, sir. We are in the

process of determining the supplemental payments to the ones that moved after August 23 and getting back to them with this new brochure the federal government has just approved and offering them the payments.

Q. I think I cut you off when you were explaining that there were only two families too large for public housing. Did you get a waiver on the one? A. Yes, sir.

Q. What happened to the other [352] A. We haven't asked on that yet.

Q. That's the only one down there that's too large? A. Yes, sir.

Q. Have you made a survey for me to find out how many Negro families are not relocated in the path of the interstate but have come from the path of the interstate in the Triangle district, roughly how many left? A. We don't keep any records on black or white or non-white at all but since it was raised and you asked we did make a count in the Triangle area. Yesterday there were forty-nine families total to be relocated. Eighteen of these were white families. One nonwhite family is relocated or just been finished this morning. That would leave forty Negro families left to be relocated in the Triangle area.

The Court: In the corridor of the interstate?
The Witness: In the corridor of the interstate.
The Court: Of both these projects?
The Witness: Of both projects.

Q. It might be misinterpreted; you were not keeping figures on Negro and white before this case? A. No, we didn't keep any before this case.

Q. And it is only since you did the survey that I asked you to do this? A. That's right.

[353] The Court: Gentlemen, let's take a recess for about five minutes.

(Recess taken.)

Mr. Preiser: If your Honor please, just one moment to introduce one letter and some maps and I will be through.

Q. Mr. Colan, I show you a letter on Legal Aid stationery dated February 10, 1969 to you signed by Mr. Lytton and a reply dated February 19 bearing your stamp, again being photocopies, and ask you if that was received by virtue of the request being made by the Legal Aid attorneys that assurances be given people in the Triangle district of the payment for relocation costs. Was that the tenor of the letter and the reply? A. It was an inquiry about eligibility for relocation costs.

Mr. Preiser: We would like, your Honor, to make this part of the record. We would like to have that marked for identification Defendant Ritchie's Exhibit whatever it is and ask Mr. Colan if that's part of the official records of his office insofar as relocation is concerned.

The Witness: Yes, sir.

Mr. Preiser: And move its admission, your Honor, as Defendant Ritchie's Exhibit.

The Clerk: Defendant Ritchie's Exhibit 4 [354] marked for identification.

Defendant Ritchie's Exhibit 4 for Identification

The letters referred to were marked as indicated above.

Mr. Preiser: And move its admission, 4-A and 4-B, if we might, two letters together.

Mr. Davidson: May I look at it briefly, your Honor?

The Court: It doesn't necessarily bear upon the operative issues in this case.

* * * * *

Defendant Ritchie's Exhibit 4

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Davidson: May I ask one question on voir dire?

The Witness: All right.

Mr. Davidson: Mr. Colan, did you underline this document in red?

The Witness: Yes, sir, to the best of my recollection I did.

[355] The Court: All right.

Mr. Davidson: We object to its materiality in this case, your Honor.

The Court: The Court, as I say, recognizes it doesn't necessarily bear on the operative issues in this case but it provides further insight as far as the Court is concerned into some ramifications that have developed.

Q. Mr. Colan, I show you here two maps marked for identification Defendant Ritchie's Exhibits 5 and 6.

The Clerk: Defendant Ritchie's Exhibits Number 5 and 6 marked for identification.

O. R. Colan—for Defendants—Recalled—Direct

Defendant Ritchie's Exhibits 5 and 6 for Identification

The maps referred to were marked as indicated above.

Q. Would you tell the Court very briefly what they are and the significance of them, the top map which is Exhibit 5? A. The top map is one showing project I-77-3(66)100 with the parcels that have been acquired colored in red.

Q. Acquired by the State Road Commission? A. Acquired by the State Road Commission, yes.

Q. In the right of way where the road is going to go? A. Yes.

Mr. Preiser: We move its admission, your Honor, into evidence.

The Court: All right.

[356] Q. This second one, Defendant Ritchie's Exhibit Number 6, what does it show and what is the significance? A. It shows the parcels in red which have been acquired by the State Road Commission for project I-77-3(62)98.

Q. Within the right of way of the roadways involved? A. Yes; the same project shown as project (67) on the large exhibit.

Q. These are updated to what date, Exhibits 6 and 5? A. I believe Monday.

Q. This past Monday? A. Yes, sir; Monday of this week.

Mr. Preiser: We move into evidence, your Honor, Exhibits 5 and 6.

The Court: They will be admitted.

The Clerk: Defendant Ritchie's Exhibits 5 and 6 admitted in evidence.

O. R. Colan—for Defendants—Recalled—Cross

Defendant Ritchie's Exhibits 5 and 6

The exhibits referred to, previously marked for identification, were admitted in evidence.

Mr. Preiser: That's all we have of this witness, your Honor.

The Court: Cross-examine.

Mr. Davidson: Is the proper sequence for the other defendants to examine first?

[357] The Court: I assume that it has been fully developed. You have nothing?

Mr. Upton: I have no questions, your Honor, of this witness.

The Court: Go right ahead.

Cross-Examination by Mr. Davidson:

Q. Mr. Colan, referring to Defendant Ritchie's Exhibit Number 1, on what date was that document prepared? A. It was prepared in the latter part of February 1969. I don't think it was on a specific date. It was a combination of a lot of work.

Q. Who is Robert E. Scott, the gentleman who signed the document? A. Mr. Scott works for me and works on making these studies in conjunction with me.

Q. Did he undertake this study under your direction? A. Yes, and with my help on this one.

Q. This is a study limited to a relocation plan for the Triangle area, is it not? A. Yes, sir.

Q. Have you prepared studies for other areas affected by the interstate highway system in the City of Charleston? A. No, sir.

[358] Q. How did you select the Triangle area as the sole area for this study? A. If you mean this written

study, we have a continuing study evaluating the needs of the individual property owners, businesses and tenants and the available property for all of the people being dislocated in Charleston. This has been under way since the inception of the program. This written report—

Q. Is this the only study styled—

The Court: Let him finish his answer.

Mr. Davidson: I hadn't finished my question.

The Court: You had asked him a question.

Mr. Davidson: I'm sorry.

The Court: Go ahead. Finish your answer.

A. This particular written report was started by Mr. Scott for me on the Triangle question after this case was instituted and I asked him to summarize the data for me in the Triangle in a written form.

Q. Have any relocation plans been completed for any other section of the interstate highway system in Charleston? A. In Charleston? No, sir; the projects in Charleston were all authorized for right of way acquisitions prior to the effective date of the Highway Act and in accordance with our procedures we submitted to the federal government we [illegible] specifically said we would not go back on any of those projects but would pick up with the sequence of events where we were. That was the procedure that was approved in writing by the federal government and we did not go back and spend time writing lengthy documents when these project relocations are so far completed and it was not required by the 1968 Highway Act.

We felt that we were doing a better service to the people providing them with relocation assistance at a point when the projects were substantially completed than we were

in taking the personnel off of helping the people to go back and write lengthy reports reporting data which was well known as a result of our continuing studies.

Q. Why then, Mr. Colan, did you select the Triangle area as the sole area to prepare a relocation plan? A. Because you brought this suit, sir.

Q. Mr. Colan, do you consider in this plan developed for the Triangle area displacement to be caused by the interstate highway system outside of the Triangle? A. Yes, sir.

Q. In what way do you consider that, Mr. Colan? A. In preparing the report there is a distinct difference between the remaining people to be relocated and the requirements for their housing. For example, one large area [360] besides the Triangle where there are substantial—more than thirty families or forty like this group here, where there is some number of people to be relocated, is the Fort Hill area in which we are talking about houses in the $50,000, $60,000, $70,000 class group. They are not competing for the same housing market.

Another segment where a number of relocations remain is in the east end section along Greenbrier Street, where you do not have people who would be generally competing for the same type of housing. You have people who are in a generally much higher income bracket and who are home owners living in $30,000 and up houses who will be purchasing other houses and will not be competing in the rental market for houses renting for under $100 a month or under $60 a month.

Q. Mr. Colan, are there anywhere along the route of the interstate highway system in Charleston other families with incomes of under $6,000 who are living outside the Triangle area who are yet to be displaced? A. A few, yes, sir.

Q. Where do they reside? A. They are scattered along

both West Charleston and the east end of Charleston. I believe there are still a very, very few in the Vandalia area, three or four or five; something like that.

[361] Q. Did you undertake in connection with this plan to quantify the number of families outside the Triangle area with incomes of less than $6,000? A. In relation to this particular written report it is not contained in there. The situation is well known to us. There are so few left to be relocated in that class that they are rather insignificant in the overall relocations.

Q. Do you have in your possession in your office any surveys or studies which would show how many families of under $6,000 income outside the Triangle area are yet to be displaced? A. We have surveys that have been made of all the people.

Q. Could those be made available if so requested? A. They could be taken out of each of the parcel files, yes, sir. There is a difference between a great many of the people that remain in the low incomes, for example, in parts of West Charleston and the east end in that some of these are very low incomes, are widows, for example, on Social Security who live in a home that they own, and there are a great many distinctions between the remaining people who are in that income group as to why they would not be competitive for the same housing accommodations.

Q. Are widows eligible for public housing? [362] A. I don't know that we have any significant number outside of this area that have indicated any interest in public housing when we surveyed. There were very few outside of the Triangle area indicated any interest in public housing.

Q. Did you consider the question of whether someone was interested in public housing a relevant question? A. Well, it is one of many questions that we asked.

Mr. Preiser: Just a moment, please, your Honor. Was the question did you consider public housing a relevant question?

The Court: Did you consider an interest in public housing as a relevant question.

Mr. Preiser: Insofar, your Honor—

The Court: Let's not make a speech, Mr. Preiser. Let's get on with this thing. Go ahead.

Q. Please answer the question.

The Court: He answered. He said that among others.

Q. If someone indicated that he was not interested in public housing, did you continue to consider public housing as a relocation resource?

The Court: For that individual?

Mr. Davidson: Yes, sir.

A. For that individual? To the extent that some of them will change their minds. We know from experience in [363] relocating many thousands of people that there are a great many who change their minds as to what they are doing and you can just about evaluate what the percentages will be.

Q. Have you applied those tests to persons living in the Triangle area? A. In our general judgment we considered them, yes, sir.

Q. Therefore, if someone in the Triangle area was not interested in being relocated into public housing, did you then exclude public housing as a relocation resource for such a person? A. Not entirely because we realize that some of them initially indicate they aren't interested, will

ultimately be interested, and actually some people we have a very difficult time explaining what public housing is. It is quite a complicated process because when you ask them are you interested in public housing, some of them think is this free housing I get some place? It takes a great deal of conversation before you are even sure you are conversing about the same subject.

Q. Mr. Colan, does the relocation plan for the Triangle area analyze the preferences stated by persons in the Triangle area for relocation housing? A. No, this particular plan that I had prepared for me does not include it in the plan to the best of my knowledge.

[364] Q. Will persons who are eligible for public housing and who will be displaced from the Triangle area have preference over persons who are eligible for public housing residing outside the Triangle area in their admission to public housing? A. To the extent that they have preference under the housing rules.

Q. Do housing rules make any differentiation between persons displaced by highways within the Triangle area and persons displaced outside the Triangle area? A. Limiting your question to highway displacees, no, sir, it does not make a distinction.

Q. Then an analysis of the availability of public housing as a resource for persons to be displaced by highways must include an analysis of those persons outside as well as inside the Triangle. Is that not correct? A. Yes, sir. If we include the people outside the Triangle as well as inside instead of thirty to sixty days it would take sixty to ninety days to put them in public housing.

Q. You haven't quantified that in your report, have you? A. No, sir.

Q. Mr. Colan, you testified that you are familiar with

the admission and occupancy policies of the Housing Authority of the City of Charleston which are now in evidence as [365] Plaintiffs' Exhibit Number 19. Is that correct? A. The provisions on preference for relocation.

Q. Have you also examined the rent schedules contained in that document? A. I have at one time. I do not remember them.

Q. Are you aware that in Exhibit A on page 2 there appears a different schedule of rents for persons displaced by public actions and for persons eligible for public housing under any other test? A. No, sir, I am not aware of that.

Q. Mr. Colan, did your relocation plans show that the turnover rate in public housing is the lowest in the public housing project located in the Triangle area? A. I would have to look at the figures again to see which one is the lowest.

Q. Do you have the report before you? A. Yes, sir.

Q. It is the lowest, isn't it? A. Yes, sir.

Q. Do you know the racial compositions of the various housing projects of the City of Charleston? A. No, sir.

Q. Would you consider that to be a relevant inquiry? A. No. sir. We do not consider anything relevant to [366] racial issues in relocating people. We do not distinguish between citizens of the State of West Virginia in one way or the other.

Q. You did consider whether the housing market is equally open to blacks as well as whites?

The Court: Are you talking about the public housing?

Mr. Davidson: That was a more general question.

The Court: Let me ask you this. Is there any

evidence of any segregation practiced in the Charleston housing facilities?

Mr. Davidson: I don't know, your Honor, except that if you look at the housing projects one project is, as I am informed—and I would not put this in the record as fact but only information—the Littlepage Terrace project is overwhelmingly white and for some reason the Washington project is predominantly black, and that predominantly black project has the lowest move-out rate.

It seems to me that that bears on the relative ability of low income blacks to move out of public housing projects into the private rental market as compared to the ability of whites to move out of public housing projects into the private rental market.

The Court: I see your inference from that but what I was wondering was whether there was any inference in your [367] question. I was going to ask Mr. Colan, for instance, have you run into any difficulty in, let's say a black family dislocated down here in the Triangle area in trying to get them into Littlepage or Orchard Manor?

The Witness: No, sir; none whatsoever.

The Court: I see your point but I wanted to clear that up. I wasn't aware, as a matter of fact I assumed there wasn't segregation practiced in the Charleston housing in the public area.

Mr. Davidson: I just was informed of the relative distribution and wished to ask a question that suggested itself from that, your Honor.

The Court: But you don't take the position that dislocatees here are being denied available housing in either Littlepage or Orchard Manor?

Mr. Davidson: I take a position neither way, your Honor. I don't know. I haven't inquired.

The Court: If you take a position neither way, that's enough for me.

Q. Mr. Colan, have you made any studies of the private rental market in the City of Charleston to determine whether housing is equally available to blacks as well as whites? A. We make continual studies of the housing in the Charleston market. We have during the course of that study [368] had an occasional person who lists a property with us tell us that it was for white only and we refused to put it on the listing. We have had a few people tell us their property was for black people only and we have refused to put that on the listing. We just don't list them.

Q. Do you make an affirmative inquiry as to whether the property is available for blacks as well as whites? A. No, sir. We have an open housing ordinance in the City of Charleston and I do not ask the people if they are going to live up to the law.

Q. Does the open housing ordinance in the City of Charleston cover all types of housing units? A. No, sir.

Q. What does it exclude, Mr. Colan? A. I would hate to try to summarize it.

Q. Did you consider that to be relevant in your determination of whether there was sufficient private housing available? A. We consider the availability under the Charleston Open Housing Act and for such reasons we have eliminated, for example, the private room situation because it is very difficult to ever rent a private room to anyone.

Some people are prejudiced just because they don't like tall people. Some people will not take take females. They

[369] hang their laundry out in their room. The private room situation is a very delicate thing because each one has their own criteria for who they want living in their house.

Q. Isn't it true that your study, which is Defendant Ritchie's Exhibit Number 1, does not include any study of the impact of racial discrimination on the availability of relocation housing? A. We do not find any significant racial discrimination in Charleston.

Q. I thought you said you were just assuming that. A. Apparently you are incorrect, sir.

Q. What kind of studies have you undertaken to support your finding? A. Just my experience in relocating people in Charleston, relocating about 2,000 total in the last two years.

Q. I would like to turn your attention to the page devoted to available rentals in Defendant Ritchie's Exhibit Number 1, the relocation plan. These are, I assume, Mr. Colan, rentals in the private housing market. A. Yes, sir.

Q. Was any effort made to determine the size of the rentals shown on this page? A. Yes, sir. We keep the number of habitable square feet, the number of rooms, all these details.

[370] Q. What was the reason for not indicating in a relocation plan the size of the units shown on the page? A. Well, sir, I was having them prepare a report of data for me and not the type of report that is generally used in Urban Renewal, where they pay a consultant many thousands of dollars to spend months studying the situation. This is not the type of report that we are talking about in these other reports where we have over a hundred pages of report of someone giving his opinion on the 1960 census figures in Charleston. We try to limit it to the data out of our current studies.

O. R. Colan—for Defendants—Recalled—Cross.

Q. This report to the Department of Transportation, would it show the size of the units available on the private rental market? A. It could or could not show them. Under the Informational Memorandum which asks for such a study, the Informational Memorandum is the only thing that asks for that on projects before right of way is authorized. There is nothing in the Highway Act at all which asks for any type of relocation plan.

Q. Assuming, if you will, that relocation plans are required, the regulations of the Department of Transportation would require a further analysis of the private rental housing, would they not? [371] A. I doubt it.

Q. You doubt it. Do you base your testimony upon knowledge of the Informational Memorandum? A. I base it on my recollection without going back and re-reading the provision, sir.

Q. Has this plan been submitted to the Department of Transportation? A. Informally their representative had read it from time to time and we did mail it to them a few days ago.

Q. Did you request any action on the basis of your submission? A. I don't believe so. I think we just sent it to them.

Q. Do persons displaced who will find housing in the private market have priority over other persons in the private market?

The Court: The answer to that is obvious. Private market?

Mr. Davidson: Yes. This is a foundation for the next question.

The Court: How could they?

Q. Granting that, Mr. Colan, is it relevant to consider the competition in the private market for the housing listed under available rentals in determining whether those rentals will actually be available for persons displaced by the [372] interstate highway system? A. The available rentals shown in here, as in any report are on a given date. Today there are 88. Last Friday there were 104 available. The listing, this morning you can call and it is gone this afternoon. You have to keep it current at all times. You have to consider not only these units, the ones that are for sale that other people are competing for and the total number of units available in any relatively short period of a few months in Charleston is adequate to relocate all the remaining people from all the interstate projects if we were trying to relocate them in such a short period of time.

Q. Your testimony is that people displaced by the interstate highway system are competing with other persons in the City of Charleston for available rentals? A. Competing with the whole market, private market.

Q. Did you consider it to be relevant in the preparation of a relocation plan to analyze the extent of that competition? A. I suppose you could consider it relevant. I did not.

Q. If this plan were to be submitted to the Department of Transportation would such an analysis be required? A. I can't speak for what they require.

Q. So this plan is not based upon the regulations of [373] the Department of Transportation. Isn't that correct? A. This plan in my opinion conforms with their regulations. If a plan were required on this project, it would be adequate to supply any plan required by any current regulations.

Q. How did you discover that 79 rentals were available on February 24th, 1969? A. We have a staff of ten people assigned full time to these two projects. In addition we make available regularly members of our staff to check housing. On one particular day we let twenty men spend the whole day and the next day examining housing that was available in the Charleston market.

We had the other ten people continually checking it in the Charleston market and inspecting it and then if they need help we assign additional personnel. I believe last week we had maybe fifteen people for one whole day out checking private rentals and inspecting, getting photographs and the details to meet these requirements.

Q. Turning to the following page in this exhibit which is entitled single room rentals, have you determined that the rentals available in the various hotels listed conform to the requirements of decent, safe and sanitary housing as described in the Department of Transportation's regulations? A. If you are referring to the rental units, these [374] units, these facilities were inspected to see that they had the standards that were set forth in the IM. We did not inspect every unit in every building. We did not inspect each individual room in a hotel since there is a turnover and a room that is here today is not the room that's available tomorrow.

Q. Did you determine whether any of these hotels are located in areas scheduled for Urban Renewal? A. The Worthy Hotel is not. The Grant Hotel is not. The Holley Hotel is definitely not. The Ruffner Hotel is definitely not. I couldn't say definitely on the other three.

Q. What is the location of the Lee Hotel?

The Court: It says it is on Lee and Court Street.

Q. Is that within the scheduled Urban Renewal area? A. To the best of my knowledge that is within the area that we have been talking about for Urban Renewal for many years; yes, sir.

Q. Is your answer the same for the Reynolds Hotel? A. Yes, sir, in the area that for years we have been talking about for Urban Renewal.

Q. Is it the policy of the State Road Commission to move persons from one area of displacement to another area of displacement? A. Not if there were an active project going, but these [375] Urban Renewal Projects have been talked about and nothing has materialized over the years. As a matter of fact, I keep reading that the project is going to be litigated. I see nothing very encouraging about its immediately appearing.

Q. Mr. Colan, in the analysis at the beginning of the plan you did not consider it relevant to appraise the dislocation impact of the Triangle Urban Renewal Program? A. No, sir. From all of the years that I have worked with this and my knowledge of the Urban Renewal Program I do not foresee it involving any relocations during the period of time that we are talking about here. I understand your organization and the Legal Aid Society has indicated they plan on litigating it. They have worked on the subject opposing it.

It doesn't look like there is any material prospect in my opinion. I was told in 1964 or '5 that they were going to have the project next year. In '66 I was told it was going to be next year. In '67 I was told it was going to be next year. In '68 it was going to be next year. Now it is '69 and we are still talking about a workable plan.

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[376] * * *

Q. Mr. Colan, you indicated that you report no information by race as part of your regular reporting system. A. That's right.

Q. Are you familiar with the attachment marked attachment number one to the Department of Transportation's relocation regulations? A. I believe I am.

[377] Q. Do you complete that attachment form which is described there quarterly? A. Yes, sir.

Q. Does that require reporting by race? A. It requires that we estimate the number of white and nonwhite. The original requirements of the Bureau of Public Roads were that we keep records of the number of whites and nonwhites. West Virginia state law prohibits keeping such records as discriminatory.

Therefore, they violently opposed this, that they were asking us to violate West Virginia law by indicating white and nonwhite in these reports. The federal government revised their form and it says on their form "white—estimate; nonwhite—estimate" because we do not keep any records and we simply make a guess it is ten percent, five percent, whatever our recollection is of the estimated percentage.

Q. How long have you been submitting reports containing estimates? A. I wouldn't remember the exact date. I'm sorry.

Q. Was it prior to the preparation of this plan? A. Yes.

Q. Do you know how the Department of Transportation's regulations define displacement? A. I am familiar with it. I could not quote it.

[378] Mr. Davidson: They appear, your Honor, on page 24 and 25 of Plaintiffs' Exhibit Number 2.

O. R. Colan—for Defendants—Recalled—Cross

Q. Have you finished, Mr. Colan? A. Yes.

Q. Is the definition of displacement used in the regulations limited to actual evictions? A. I'm sorry; I didn't understand your question.

Q. Does the Department of Transportation limit its definition of displacement to actual evictions under court order? A. I see no reference in their definition to evictions any place.

Q. Is it not true that the Department of Transportation requires a relocation plan and relocation services for any person who leaves his property as the result of the reasonable expectation that the property will be acquired for highway? A. No, sir.

Q. Is your answer consistent with subparagraph (5) on page 25? A. Subparagraph h(5) on page 25 says, "Any other move from real property subsequently acquired for a federal aid highway, takes place as a result of the reasonable expectation that the property will be acquired for the highway, shall be deemed a displacement caused by the highway project [379] for purposes of this PPM."

This is not a PPM so I don't know what their reference is to a PPM and this is talking about this would make such a person eligible to receive benefits as a displaced person. This is an IM that you are talking about and that's referring to a PPM.

Q. It's obvious that they are referring to this document, is it not?

Mr. Preiser: I object to that.

The Court: It isn't so obvious.

Q. Are there any other regulations of the Department of Transportation concerning relocation which are encom-

passed within a Policy and Procedure Memorandum? A. Yes.

Q. What are they? A. The regulations of the Bureau that relate directly and indirectly to relocation are rather voluminous and I believe there are whole PPM's on the subject, Circular Memorandums and Informational Memorandums. It's a continual process of paper, their regulations covering this.

Q. Have any Policy and Procedure—

The Court: Just a minute. We are going to recess, gentlemen, until 2 o'clock. You may step down.

(Recess from 1 o'clock p.m. to 2 o'clock p.m.)

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[380] AFTERNOON SESSION

The trial was resumed at 2:20 p.m. pursuant to the recess noted above.

The Court: All right, Mr. Davidson.

Mr. Davidson: Just a few more questions, if your Honor please.

O. R. COLAN resumed the stand, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination by Mr. Davidson (Continued):

Q. Turning your attention to Defendant Ritchie's Exhibit Number 2-A and particularly to the map showing cumulative relocation from January 1967 to March 1969, I would like to examine the area of Interstate 77 along the

Elk River and tell me whether the exhibit shows that persons have been relocated onto the route of the expressway. A. To the best of my knowledge the dots on here are placed relative to where they are in the block from the hundred number and the dots look like some of them would go into the route of the expressway. To the best of my knowledge none were.

Q. Were you here in court yesterday when Mr. Saunders testified as to the number of persons who have already been [381] displaced by the interstate highway system in Charleston? A. Yes.

Q. Correct me if my recollection is incorrect, but I recall his testimony that a little over 600 households have been displaced by what we have called Project A and over 400 by what we have called Project B. A. I'm sorry. I do not recall what his testimony was.

Mr. Upton: Your Honor, if I may interpose in his question, I think Mr. Saunders only referred to persons and not households.

The Court: I don't recall. The rather broad term household leads to some confusion. I don't remember whether it was persons or households.

Mr. Upton: I think that's correct, your Honor, because we do not use the terminology "household" under the Bureau of Public Roads.

Q. Mr. Colan, do you know how many households have been displaced to date? A. I know how many people have been displaced or families, but household is Urban Renewal language, I believe. I have the records here some place. I will have to look for them. I believe the total that we have actually paid—I don't seem to find the figure but to

the best of my recollection we had actually paid 675 in Charleston, and that [382] would include families or individuals, and then there are another group of, oh, some place between 70 and 100 who are in the process of moving or who have moved and have not filed any claim yet but who are already relocated, so it would be a total of 700 and, oh, fifty family units, if you count one person living by himself as a unit.

The Court: Is that in the entire city?

The Witness: Yes, sir.

The Court: Mr. Davidson was asking if you knew about the particular area here which we are referring to as A and B.

The Witness: Just the Triangle. I'm sorry.

Mr. Davidson: Actually I think I would now want to rephrase it to the question that he answered.

The Court: All right. You needn't look it up. The question has been changed.

Q. Did you testify earlier, Mr. Colan, that the dots entered on Defendant Ritchie's Exhibit 2 represent all the families who have been displaced? A. No, sir. The dots on this exhibit represent a very high percentage of the families that have been displaced to the areas shown on this map. There are some other families who have relocated, for example, at St. Albans, which is just barely off this map.

[383] A few relocated in Chesapeake, in Rand, just barely off this map, and they are not plotted on here. The map was in relation to the City of Charleston, is the prime purpose of the map.

Q. Do you know how many family units are represented

on these maps? A. If you mean more than one person in the family, I do not have that information without recounting from the files. To the best of my recollection in the entire Charleston area it was, oh, I would say in the neighborhood of 500, 400 and something.

Q. Therefore you are missing well over a hundred family units in these maps. Is that not correct? A. I don't know if I follow your question. I'm sorry.

Q. These are maps of the urban area of Charleston. Is that correct? A. Yes.

Q. And your summary totals indicate 616 family units have been relocated within the urban area of Charleston. Is that correct? A. No, he has plotted—yes, sir; 616 within the urban area. Yes, sir.

Q. So that your relocation maps describing where families have been relocated omit over a hundred family units? [384] A. Well, the total units relocated would be in excess of the total shown on here because these are plotted only after they apply for moving payments and we process their claims for moving payments, so there is always a difference of maybe 75 or a hundred units between the time they move and the time they apply, the time they are paid and the time it gets back to the drafting department and they plot them on. There is a time lag between. It would not represent the total currently. It would be behind some units.

Q. Do you know where those additional hundred families or so are relocated? A. We know the ones whose claims have already been in. We know where a great many of the others who have not filed claims have relocated too. There are some people who occasionally, one or two just do not want to file a claim.

Q. Is this information recorded on records in your office? A. Yes, sir. We keep individual records on every individual piece or parcel of ground.

Q. Could they be made available for examination if so requested? A. They are in several hundreds and hundreds of files. I assume they could be.

Q. Referring now to Defendant Ritchie's Exhibit Number 5 [385] which you testified showed acquisitions along the route of Interstate 77, how did you define acquisition for the purpose of the preparation of this exhibit? A. Any property that we had optioned and accepted or entered a condemnation suit on, acquired entry in the condemnation suit. It is the point that we are bound for it.

Mr. Davidson: Your Honor, that concludes cross-examination apart from one request that we would like to make through the Court to counsel. There was some question over whether a reference in Plaintiffs' Exhibit Number 2, the relocation regulations, applied to that set of regulations or some other. If these are within the possession of defendants, if the reference is to another set of regulations we would request they be filed with the Court and served upon counsel for the purposes of briefing.

The Court: Are you talking about the PPM?

Mr. Davidson: That's right. I am convinced it is that document because it does say "this PPM", but if there is any question about it—

The Court: No, this, Mr. Davidson, is an IM as I understand it. Is that correct? This is an Instructional Manual. The PPM as I understand is a Policy Procedure Manual, I guess. What page is it on? It was under 7, wasn't it?

Mr. Upton: 25, your Honor.

[386] The Court: Page 25.

Mr. Davidson: Subparagraph (5).

The Court: "Any other move from real property subsequently acquired for a federal-aid highway, which takes place as a result of the reasonable expectation that the property will be acquired for the highway, shall be deemed a displacement caused by the highway project for purposes of this PPM." I see what you mean. You feel that they intended—this is IM what?

Mr. Davidson: 80-1-68.

The Court: Your feeling is that was an inadvertence and that that refers to this IM 80-1-68. Right?

Mr. Davidson: Yes, and further if you peruse other parts of this set of regulations when there is reference to another policy or procedure memorandum it is numbered very explicitly. All I am saying is if I am not correct and it is a regulation which is a public document, that it be made available to the Court and the parties for the purpose of the analysis of this case.

The Court: All right.

Mr. Upton: Your Honor, first of all I don't know the answer to his question. Perhaps Mr. Colan can answer it or perhaps some of my people can answer it, but regardless whether it is a PPM or this IM I think it is immaterial here [387] in light of the prior testimony. This keeps talking about subsequently acquired real estate. All of the right of way was authorized as far as the Bureau of Public Roads was concerned or programmed prior to the passage of this Act.

The Court: That may or may not be correct, but the breadth I have granted in this hearing I think that I would be inclined to clear it up, if it is an inadvertence or if there exists something that you can identify with that designation that you let these gentlemen take a look at it.

Mr. Upton: Mr. Saunders is in the courtroom.

The Court: We will take it under advisement and it may be cleared up, and if it isn't we will find out.

Mr. Upton: I don't know the answer.

Mr. Davidson: We have concluded with the witness.

The Court: Anything further, gentlemen? I trust not from this witness.

Mr. Preiser: I have one question of the witness, but I think I might have inadvertently failed to move into evidence Defendant Ritchie's Exhibit Number 1 after it was identified by this witness, and if I did I now so move.

The Court: Is that correct? Has it not been?

The Clerk: Yes, it has not been.

The Court: It will be admitted.

[388] *Defendant Ritchie's Exhibit Number 1*

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Preiser: I would like to ask one question.

Mr. Davidson: Your Honor, may I enter an objection to that for the purpose of the record? It was a draft prepared by defendants solely for the purposes of this litigation. It was apparently not in the normal course of business. That isolates one area that was involved in this.

O. R. Colan—for Defendants—Recalled—Redirect

They did not prepare a relocation plan for any other section, although they profess they are not under any obligation to prepare any relocation plan, and it is a self-serving document.

The Court: If it is, it wouldn't be the first self-serving document to come into this lawsuit. I am going to admit it. Go ahead.

Redirect Examination by Mr. Preiser:

Q. Mr. Colan, so we don't have any mistake about how fast these people have to be relocated, over what period of time will relocation take place of the people within the Triangle area that do have to be displaced? A. Over the period of time it takes to see that every one of them is offered safe and sanitary and decent housing [389] so that no one is forced to move until they have these accommodations available.

Q. How long will it be before you start that road building through there? A. Tentatively that section is scheduled for the last half of next year.

Q. Last half of 1970? A. Yes, sir. Parts of it, the river piers, might be ahead of other parts. It is in segments.

The Court: Is that all, gentlemen?

Mr. Upton: Your Honor, I apologize. One item was brought up that I would like to clarify.

Recross-Examination by Mr. Upton:

Q. That is in regard to Defendant Ritchie's Exhibit Number 1 and whether that was submitted to the Bureau of Public Roads or not. I believe your testimony was that it had been provided on an informal basis. Is that correct,

Mr. Colan? A. It had earlier been provided on an informal basis with our right of way officer. We received a written request for it from the Bureau to the best of my recollection and we complied with that request and formally transmitted it to the Bureau.

Q. It is true, is not not, Mr. Colan, that the files [390] of the State Road Commission are subject to constant review by the Bureau of Public Roads? A. That is true, isn't it? A. Very much so, yes, sir.

Q. And it is true that the information upon which this document was prepared is contained in its files. Is that correct? A. Yes.

Q. And the Bureau is well aware of their ability to gain access to your files. Is that correct? A. Yes, sir.

Mr. Upton: That's all.

Mr. Jones: May it please the Court, I have a couple of short questions. I would like to ask Mr. Colan.

Recross-Examination by Mr. Jones:

Q. Have you at any time before the commencement of this action had a conference with the Triangle Improvement Council or its members or officers? A. Yes, sir.

Q. And when was that? A. Well, I believe the day before the Triangle Improvement Council got their charter with the Secretary of State they called and arranged an appointment to discuss the interstate highway. They called about May 20th, 1965. They [391] wrote a formal letter a few days after that.

The then Commissioner assigned me to meet with them, along with Don Rude, who does our interstate design work.

We met with them, I believe it was on June 7th, 1965, to discuss the location of the highway and explained it to them and the relocation program and employment practices.

About a year later, and I cannot find the exact date, they asked us again to meet with them and we met sometime in 1966 with them to go over the current status of the interstate project and our proposed relocations.

After that I have had at least two meetings that I can remember with the now President of the Triangle Improvement Council, Urban Renewal people, city people, concerning relocation, how relocations would be handled I would say in the last year and a half. I do not remember the specific dates without looking it up.

Q. Were there any protests as to the location of this section of the highway at those meetings? A. No, sir.

Mr. Jones: That's all.

Recross-Examination by Mr. Davidson:

Q. Mr. Colan, you testified that the Bureau of Public Roads requested the plan which you call a relocation plan for [392] the Triangle. A. They sent a letter saying that they understood we had a plan, something to that effect. I really don't remember the language of it, and asked if we would send them a copy.

Q. When was that letter sent to you? A. I don't remember. It was recently. Recently.

Q. Within the last month? A. Yes; to the best of my recollection it was within the last month.

Q. To your knowledge has the Bureau of Public Roads made any determination of whether or not that plan con-

stitutes satisfactory assurance of the availability of relocation housing? A. To the best of my knowledge I can see no reason why they should make a determination since it has been their position in writing to us that no plan is required for these projects.

Q. You say it is their position in writing to you? A. Yes, sir.

Q. Has the Bureau addressed itself specifically to these two projects? A. Well, on two occasions, one in submitting our formal procedures to them, we specifically set forth in that letter, which is in this record, that on current projects [393] which were under acquisition we would not go back and do anything prior to the phase that we were in, the step that we were in right now, whether it was negotiations, appraising, whatever step were were in—we would not go back and do any steps on old projects that were under this PPM required for a new project. We wouldn't go backwards on a project.

This includes doing a plan which is required before authorization to acquire when we had already received authorization to acquire before this. This was discussed with Mr. Carpenter, who is the Division Engineer for the Bureau of Public Roads, and Mr. Swanson, who is in charge of all right of way and location for the Bureau of Public Roads in their Washington office.

We specifically discussed the projects in the Charleston area with them at a meeting I believe in Richmond, Virginia. It was in Virginia at a meeting and they agreed at that time that under the requirements of their IM that we did not have to go back on these projects and do a relocation plan when we were already into the acquisition and relocation phase like we were in the Charleston area.

O. R. Colan—for Defendants—Recalled—Recross

Q. Was that agreement expressed in writing or was that oral? A. Well, the agreement is embodied in the acceptance of the State Road Commission's procedures under the '68 [394] Highway Act and our interim operating procedures, both of which govern it.

Mr. Davidson: Your Honor, I'm not sure whether that has been introduced into evidence. Do you recall?

Mr. Preiser: What document?

Mr. Davidson: Interim operating procedures.

The Court: I don't know. I couldn't keep up with all of them.

Mr. Preiser: I suppose, Mr. Davidson, he is talking about IM 80-1-68 and the amendments and letters. I can tell you where it is.

Q. Are you talking about that? A. No, sir. The documents that were introduced by Mr. Saunders, including related correspondence, included a letter of November 13, 1968 to Mr. Carpenter from Mr. Hamill, the then Commissioner, giving our assurances under IM 80-1-68 and it provided in the fourth paragraph—

Mr. Upton: Your Honor, if I may make a suggestion, I fully intend to put Mr. Carpenter on the witness stand and I think this matter can be pursued with him in an effort to save time as to how this problem was handled with the Bureau.

The Witness: Third paragraph.

Q. The witness has referred to a specific exhibit. Is this the exhibit to which you have referred, Plaintiffs' [395]

Exhibit Number 5? A. That is one of them. It is the third paragraph of this exhibit. The other one I referred to was a letter of December 20th, 1968, also addressed to Mr. Carpenter.

Mr. Davidson: No further questions.

The Court: Is that all? You may step down.

(The witness was excused.)

The Court: Your next witness, gentlemen.

Mr. Preiser: Your Honor, I have only one very brief witness. He is one of the plaintiffs who was in the courtroom this morning and he isn't here now. I have issued a subpoena for him. If it isn't disorderly, Mr. Upton can proceed with his part of the case.

The Court: All right.

Mr. Upton: Call Mr. Carpenter, please.

The Clerk: Please state your name.

Mr. Preiser: Your Honor, may I inquire of the Court where Mr. Bayes works?

Mr. MacQueen: I'm sorry, your Honor. Earlier before the Court reconvened we discussed this and we don't have any knowledge of where Mr. Bayles works. We only have the information as to where his residence is.

The Court: He is not a party to this?

[396] Mr. Preiser: Yes, your Honor, he is a party plaintiff and I am trying to get a subpoena. I assumed he would be back after lunch. He was here all morning.

The Court: He was under subpoena?

Mr. Preiser: No, sir. I had not subpoenaed him.

The Court: They say all they know is his residence. Go ahead.

P. E. CARPENTER, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Upton:

Q. Will you state your name, please? A. P. E. Carpenter.

Q. How old are you, sir? Your age, please. A. Forty-three.

Q. Where do you live, sir? A. Charleston, West Virginia.

Q. By whom are you employed? A. Bureau of Public Roads.

Q. Mr. Carpenter, will you briefly advise the Court of your educational background, sir? A. I am an engineering graduate of the University of Oklahoma, graduated in 1950.

[397] Q. Did you receive any honors while you were a student at the University of Oklahoma, academic honors?

The Court: Is that material?

Mr. Upton: I was just going to ask him.

The Court: He might be too modest.

Mr. Upton: All right, your Honor. I will move on for the purpose of brevity.

Q. Mr. Carpenter, will you relate in narrative form your work experience since you graduated from the University of Oklahoma? A. After graduation I worked about four

years with consulting engineering firms on development of highway engineer designing, seven years with the Oklahoma Highway Department. Prior to my employment with the Bureau of Public Roads I was advance planning engineer for the State of Oklahoma, originated the coordinating comprehensive urban transportation plans.

After going to work with the Bureau in 1961 as an area engineer in Missouri I reviewed design and construction of the interstate highway program in St. Louis, Missouri and surrounding counties. I was promoted to the Region 5 office in Kansas City in 1962. I was engineering specialist on right of way and route location. I reviewed appraisal and acquisition proposals, including relocation assistance for the [398] states in Region 5.

In April 1964 I was promoted to the position of Regional Right of Way Engineer in Region 1 covering eight states and provided both direction and leadership to twenty-four field supervisors in the federal aid program in appraisal, acquisition, property management, relocation payments, relocation assistance and disposal of real property for the federal aid highway program.

In May of '67 I was promoted Chief of Appraisal and Acquisition to the Office of Right of Way and Location in Washington, D. C. I was a member of the top policy staff and responsible for the development, implementation, coordination and uniform application of standards and criteria relating to appraisal, acquisition, relocation payments, relocation assistance, property management, disposal of real property, including joint development, scenic enhancement, junkyard screening, controlled outdoor advertising by the federal government of states or their political subdivisions. I had authority to speak and act for the Director of Right of Way and Location in all matters pertaining to the function of this division.

In July '68 I was assigned as Division Engineer for the West Virginia Division of the Bureau of Public Roads. In this position I interpret policy and procedure within my [399] delegated authority for a staff of twenty engineers, four appraisers, eleven supporting personnel.

Q. Are you the author of any documents or contributions to periodicals? A. I have had one article published in the publication of the Society of Real Estate Appraisers based on experience in partial taking under eminent domain.

Q. Mr. Carpenter, for the purpose of brevity I will get right directly to the point we are concerned with here today. In your opinion as the Division Engineer and individual in charge and Mr. Saunders' superior, who testified here yesterday, has the State Road Commission complied with 80-1-68 and the amendments thereto in regard to each of the projects concerned in this litigation, and identify the numbers. The map has been covered up. A. Yes. I am aware of the two projects. They also have complied on approximately 200 other projects in the state.

Q. Getting directly to the question of a relocation plan, was there ever a formal waiver by the Bureau of Public Roads of a relocation plan for these two projects? A. No, sir.

Q. And why not, sir? A. It wasn't required.

Q. Can you explain that just briefly to the Court, why [400] it wasn't required? A. The specific language of this IM and the attachments thereto preclude the necessity of a requirement for a relocation plan. This is a subject which has been under discussion since basically before the law was signed by the President.

The Bureau or the Federal Highway Administrator, at that time Mr. Bridwell, called a meeting on August 14th of last year prior to the President signing the bill. This was

one of the items of discussion. In fact, this is the basic discussion, along with equal opportunity qualifications for contractors.

It was again discussed at the meeting of the Southern Association of State Highway Officials in October of last year. This was one of the main subjects of the meeting. All top highway officials were there along with all Bureau of Public Roads officials.

It was again discussed in Minneapolis in December of 1968. At this one all of the top highway officials in the United States, all Division Engineers in the United States and Puerto Rico were present. This was one of the subjects of discussion.

I have no reason to believe that this has been misinterpreted. The basic policy itself I assisted in writing [401] in Washington before I left there. I feel like I know what the intent was behind it.

Q. In other words, you are saying—

Mr. Davidson: Of course, your Honor, this is a question of law ultimately for the Court to determine. I don't know whether it is a proper subject of examination.

The Court: I think it is.

Mr. Upton: I was going to say, your Honor, this is the administrator.

The Court: Go ahead. Move along.

Q. Mr. Carpenter, from your testimony I am sure you do not mean to imply that at all these sessions the subject of discussion was these two particular projects. That is not the intent of your testimony, is it? A. No, sir, not at all. The intent of it is that the states should pick up at

the point in the acquisition process which they were in upon the effective date of the IM and they must comply in every way which they legally can with the provisions of that IM.

Q. And in what way was this communicated to the proper authorities in the State of West Virginia? A. They were in attendance at the meetings. In fact, Mr. Colan brought the subject up at the Denver meeting specifically. I might add that this also was discussed with [402] the Director of the Office of Right of Way and Location at SASHO in Richmond, Virginia. This basic problem did exist in every state in the Union. If they had to stop operations, back up and basically consider attempting to make a memorandum retroactive, if you tried to enforce all of these provisions of the IM on projects on which a substantial amount of work had already been done, it would have been unfair to the public to have stopped the work on that when they were expecting to get paid and you take your people off and start a relocation plan. Somewhere we have to stop the planning and start doing.

Q. Mr. Carpenter, moving from that subject to a specific matter, you have been present in the courtroom and heard the discussion concerning paragraph 5 on page 25. Can you answer the question?

The Court: That's Ritchie Exhibit 1?
Mr. Upton: That's in the IM 80-1-68.
The Court: All right, sir.

Q. The discussion concerning the language of the PPM. Can you answer the question? Do you know the answer? A. I can make an awful good guess at it. Basically when I said that I was in on the original draft of this IM, this

was drafted in the last part of June when the law wasn't actually signed by the President until August.

It takes a long time to put one of these together [403] where it satisfies basically every department of the federal government, so you have to start a long way ahead of time. As soon as it appeared that the possibilities were very good for passage you are directed to begin trying to implement what you feel like the law will be.

In an attempt to cut down time I am quite sure that this provision was cut out of a PPM in a paste-up and that's the way it got in. It was probably taken out of a PPM which was previously written and they decided to issue it as an IM and it wasn't changed.

The Court: So that this does in fact refer to this IM?

The Witness: I would assume that it does.

The Court: That clears up that matter.

Q. Mr. Carpenter, very briefly will you explain to the Court and for the purpose of this record where the funds come from for the building of the federal highway program? A. Basiscally the funding of the highway program—

The Court: Just a minute. I think Mr. Davidson has an objection. He probably wants to know the materiality of this.

Mr. Upton: The materiality of this is in regard to the testimony of Mr. Abeles yesterday concerning the Bureau of Public Roads building housing, and I want to establish [404] through this witness that that is not possible for the Bureau of Public Roads to engage in this type of activity.

Mr. Davidson: That wasn't the testimony of Mr. Abeles. He testified only in the land acquisition process land could be made available for public housing, but not that the Bureau of Public Roads would build housing itself.

The Court: Mr. Abeles said so much and the hour was so late I really don't recall.

Mr. Upton: This is an area I got into with Mr. Abeles on cross-examination.

The Court: Honestly I don't think that it is critical to this inquiry.

Mr. Upton: All right, your Honor.

Q. Mr. Carpenter, what steps are currently being taken by the Bureau of Public Roads to lessen the impact of the interstate highway system in the Charleston area? A. Due to the unique situation in Charleston of lying geographically within a valley of very little flat land available, the Bureau of Public Roads has presently approved additional expenditure of funds in basically two areas at this time, two major projects—one west of the Elk River; where the original plan called for it to run on fill, it will be on structure from the Kanawha River to north of Washington Street.

This is to allow any public or private development [405] which might be to the best interest of the community in this area, to replace land on the tax rolls, to preserve as much flat land as possible.

The second structure which has been approved is from the Elk River—I guess that's east to Court Street on 77. That's to preserve as much as possible the right of way. This is a double deck structure. Rather than putting the lower level on fill, it has been approved to put this on

structure, make it available for community centers, recreation, service, commercial type establishments, whatever. We wanted to have the highest and best use for that land in that area.

We have approved a park site in South Charleston on Montrose Avenue. It is a very small type park. It will have pedestrian access only. We call it City Park. Next comes pigeons, I guess.

We have under consideration and do have a study going to study the feasibility of adding a marina inside a loop of the interstate on Davis Creek at South Charleston. It has not been submitted to us yet but the state has under consideration submission of Garrison Avenue, where we are now crossing a playground, to put this on structure and try to preserve as much of the playground as possible.

This is the type of thing we are attempting to put into practice in the Charleston area to make the highway more [406] compatible with the environment through which it passes.

Q. In other words, as I understand your testimony, the area that we are discussing, the right of way for the interstate highway through the Triangle area, this highway will be on structure from the Elk River to Court Street. Is that correct? A. That's correct. This is to allow the free interplay of the community back and forth, each side.

The Court: This is all very interesting, Mr. Upton, but I don't think it is directed at the basic issue.

Mr. Upton: As I understand it this gets into Mr. Abeles' area again of land use.

The Court: Let's not get into Mr. Abeles' area. Let's stay in our area.

Just out of curiosity, how did they happen to decide to put the thing through Charleston in the first place? You have recognized the sparsity of flat land, the topography and all that, and I had occasion incident to this litigation to notice that out of ten draft plans considered nine of them were directed through Charleston and one would have skirted the perimeter up in the hills. It's purely curiosity.

The Witness: This is such a complex matter I'm not sure we could answer it here today, your Honor.

The Court: Don't answer it. I was like the [407] gentleman last night who testified, the President of the TIC. I was sitting in the rocking chair too while it happened.

The Witness: I would be happy to answer but it is going to take a long time.

The Court: We will pass it. I'm not that curious.

Q. Mr. Carpenter—

The Court: I would like to ask you one thing while it is on my mind. Were you in on some of the hearings incident to the proposed Highway Act of 1968?

The Witness: You mean present at them?

The Court: Or aware of the conduct of them and what not.

The Witness: Yes, sir.

The Court: Counsel for the plaintiffs in their memorandum have quoted verbatim from—I think they got this out of the Congressional News Report and there was a delightful section in that, 205, which had this language in explicating the import of dif-

ferent sections: "This section would expressly preclude judicial review of determinations by state or federal agencies under title II. It would provide that nothing in the title may be raised as a defense in any court proceeding, such a condemnation action."

Unfortunately Section 205 apparently wasn't in the Act as passed. Do you have any idea what the fate of that was? [408] There is no explanation in the history that indicates why it was dropped.

Mr. Davidson: Your Honor, plaintiffs intend to thoroughly scour the history and submit a subsequent memorandum to the Court.

The Court: It isn't going to help me any because 205 didn't survive.

Mr. Davidson: We think the fact that it didn't survive, it follows that the Administrative Procedure Act—

The Court: That provokes something else. I will deal with that at the conclusion of the evidence. Go ahead.

Q. Mr. Carpenter, as Division Engineer for the Bureau of Public Roads, what action would you take if you received from Mr. Saunders, your right of way man here in Charleston, a verified complaint from a resident of the Triangle area or any other area in West Virginia within your supervision, that a person or persons had been forced to relocate contrary to IM 80-1-68 and the amendments? A. The state would be refused reimbursement. Basically it would be the issuance of a pinky; so called. It is a standard form which would automatically be deducted from

the current billing claim of the state. If we received one verified complaint, after reviewing the entire file and the background I would immediately have my staff expand that [409] search to see if this was an isolated case or if it in fact existed in other projects.

Q. Mr. Carpenter, since you have been in Charleston have you ever had occasion to cite the State of West Virginia for any failure in regard to the relocation program under this IM or under the prior 1962 relocation provisions? A. Not to my knowledge on the relocation system.

Mr. Upton: I believe that's all, your Honor. Your witness.

The Court: Let me ask Mr. Carpenter one thing here before we start cross-examination. Mr. Carpenter, as Division Engineer and in the light of your experience with the interstate system and the Bureau of Public Roads, upon the evidence you have heard here as well as the record insofar as you are conversant with it, do you have an opinion as to whether or not the State of West Virginia is complying with the provisions of the Federal Highway Act of 1968 and all of the Instructional Memoranda and regulations promulgated pursuant thereto with respect to what we have referred to as Projects A and B here in the Triangle area?

The Witness: Yes, sir. I believe that they are more than complying. Certainly they are more than meeting the minimum requirements, much, much more. They are very responsive in the relocation assistance area, have always been. [410] This is one of the things you take into account in whether

you require a relocation plan, as has been brought out here in the court.

Certainly it would have been putting another hair shirt on the state to ask them to give us a formal submission on the record of what they are already doing. They would have had to stop work, put several people on this to formalize it, submit it to me, have my people review it and give them approval back. It would have served no practical purpose.

The Court: One other thing. I asked counsel to attempt to give me some indication of the hours involved of the several personnel of the Bureau of Public Roads incident to this litigation and I have received it. I don't know whether this means as of this morning or noon today, but it appears 926 hours. Did you review that?

The Witness: Very briefly. I think it is very conservative, sir.

The Court: 926 man hours devoted, that you were called upon to devote because of this litigation?

The Witness: Yes, sir.

The Court: All right. Go ahead, gentlemen. Do you have any questions, Mr. Preiser?

Mr. Preiser: No, your Honor, I do not.

Mr. Davidson: Your Honor, I will not cross-examine [411] the witness on the meaning of the Policy and Procedural Memorandum and would prefer to do that in the form of a brief. I would only like to ask the witness a few questions.

With everyone's indulgence I would like to read two memoranda which are attached, are a part of Plaintiffs' Exhibit Number 12, two paragraphs from each of these memoranda.

P. E. Carpenter—for Defendants—Cross

The Court: What is the title of it, Mr. Davidson?

Mr. Davidson: Of the memoranda?

The Court: Yes.

Mr. Davidson: The first is a memorandum dated February 26th, 1968 from Gerald B. Saunders, Division Right of Way Officer, to the Division Engineer, who was then indicated to be Morris E. Monroe, on the subject of relocation assistance in the Charleston urban area.

Mr. Preiser: If your Honor please, I would like to interpose an objection. I recall when they came in Mr. Saunders said they were internal memoranda which the state hasn't even seen. I don't see how they can affect the issue as to whether the State Road Commission has done what they are supposed to do, if that's the purpose.

The Court: I am going to find out. Go ahead, Mr. Davidson.

Mr. Davidson: And the second, which was written six days earlier, which I think I should read first, was also [412] from Mr. Saunders to Mr. Monroe.

The Court: What is it called?

Mr. Davidson: It is also on the subject of relocation assistance.

The Court: And is it in the form of a letter?

Mr. Davidson: It is in the form of a memorandum.

The Court: All right.

Cross-Examination by Mr. Davidson:

Q. I would like to ask you to consider as I read the two paragraphs whether any determinations have been made as to whether the facts shown at that time, which was a year ago, have changed.

Mr. Upton: Perhaps it would be better and I would object unless he reads the entire memorandum, your Honor, instead of taking it out of context.

The Court: I am interested in getting this lawsuit over with, Mr. Upton. Go ahead.

"Q. It is my opinion that our major area"—

The Court: This is from whom to whom?

Mr. Davidson: This is from Mr. Saunders to Mr. Carpenter's predecessor in office.

The Court: Fine. Go ahead.

"Q. It is my opinion that our major area of concern [413] lies with those people who have income over and above that which would qualify them for public housing and desire to rent. More specifically, this area would be defined as families with average annual incomes of from $5,000 to $7,500 a year and who do not want to, or cannot, buy their own home. Urban Renewal and public housing is of little value to our relocation problem in these cases, and I have reason to believe that the private housing market is about saturated presently."

A week later the Saunders memorandum was written, and in that memorandum Mr. Saunders states, and I quote: "It appears that the relocation problem in the Charleston area, insofar as the State Road Commission is concerned, could become critical in the not too distant futue due primarily to the apparent lack of rental property in the $60—$90 per month price range.

"The available replacement housing in this area is being depleted and no new sources are available at this time. In the event that Urban Renewal secures approval for their proposed projects, the

overall relocation problem will be further complicated."

I can show this to the witness, if he wishes to look at these himself.

Mr. Preiser: May we have a date on both of those, your Honor?

[414] The Court: I think Mr. Davidson gave them in the record.

Mr. Davidson: The first paragraph was from a memorandum dated February 20th, 1968 and the second was from a memorandum dated February 26, 1968.

A. Certainly as I understand your question, you are asking me has the situation changed since then.

Q. Yes. A. Absolutely. We now have the 1968 Highway Act, which provides for rental supplements. It applies the additional payments for replacement housing. This moves you out of the same rental brackets completely and also states "if Urban Renewal". As Mr. Colan brought out in the testimony, every year it was going to happen.

We have questioned it on many times. We have gone through their records but we have really not found any instance where they can't do what they say they can do. There has been a change, positively yes, because of the additional supplement payments.

I'm not at all sure they could have gone through with the relocation program in the area—not just the Triangle; South Charleston, wherever it might be—without these rental supplements. This is behind the Congressional intent to finish the interstate highway system and this is [415] necessary.

Q. Mr. Carpenter, what happens to a family after rental supplements cease in two years and who have been relocated into a housing unit beyond their financial means? A. There are many other government programs. I can't answer your question specifically unless you have a specific example. I am not a social worker.

Q. Yes, I have a hypothetical example. A family is moved into a dwelling unit which costs $120 a month. The Department of Transportation subsidizes that so that the out of pocket payments are let's say $60 a month that the person can afford, and then at the end of two years the supplemental payments cease. What does that person do in that event? A. I am not in position to answer your question. I assume you are asking a question which is up to Congress to answer.

Q. My question, as you have been asked to testify about the intent of various regulations, isn't that the very reason for the requirement that replacement housing in fact be made available in addition to supplemental payments? A. No, sir.

Mr. Davidson: Your Honor, as I have indicated, that is a proposition that's better argued.

The Court: I agree with you on that.

[416] Mr. Davidson: I have no further questions.

The Court: Anything further?

Mr. Upton: That's all, your Honor.

The Court: You may step down, Mr. Carpenter.

(The witness was excused.)

The Court: Your next witness, gentlemen.

Mr. Preiser: Your Honor, the Marshal advises me Mr. Bayes is here and I would like to call, if I might, Mr. Bayes.

The Court: Mr. Bayes.
The Clerk: Please state your name.
The Witness: Robert Bayes.

ROBERT BAYES, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Preiser:

Q. Mr. Bayes, what is your present address? A. 711 Young Street, Charleston.

Q. Is that located within the area we talk about as the Triangle area? A. Yes, it is.

Q. Who is the owner of the house where you live?

The Court: Just one second. We are having trouble [417] with our glossary. You mean is that within the area being taken by the interstate corridor?

Mr. Preiser: The pleadings, your Honor, on page 5 paragraph 9, the plaintiff Robert Bayes says they live in a house that will be taken to make way for the interstate, I-64 and I-77.

The Court: And is that 711 Young Street?

Mr. Preiser: He says here 711 Young Street.

The Court: Go ahead.

Q. Who owns the house? A. My wife and I.

Q. Your wife and you. Are you still presently the owner or have you sold? A. No, we are still presently the owner.

Q. Are you in negotiation with the State Road Commission of West Virginia for the acquisition of that house? A. Two years ago they approached us.

Q. Two years ago, and you did not come to terms with them? A. No.

Q. Have they made offers to purchase it? A. The first time they were around they did. They have never been back since.

Q. Has any condemnation suit been instituted against [418] you to make you move or take your property? A. No.

Q. Mr. Bayes, as I understand it, you are named or at least there is one person named Robert Bayes as a plaintiff in this lawsuit. Did you know that you were a plaintiff in this case? A. Yes, they approached me on this.

Q. Who approached you? A. Legal Aid.

Q. Sir? A. Legal Aid.

Q. Do you know who from Legal Aid had approached you? A. Not right offhand.

Q. Were you told that the person who approached you was a lawyer? A. Yes.

Q. You are not able to give us his name? A. No, not right now.

Q. Mr. Bayes, were you told what type of lawsuit they were going to file in your name? A. Mostly it is an injunction concerning the interstate and our moving. This is it.

Q. Meaning what? A. Relocation.

[419] Q. What do you mean? What were they going to ask for in your lawsuit? A. Well, right off I can't remember everything. In other words, we are trying to stop the interstate, the landowners.

Q. Coming through the Triangle area? A. Coming through our area. Not only that; through my property.

Q. Why did you want to do that? Why did you want to stop it coming through the Triangle? A. Personally myself it's hard to find adequate housing here in Charleston. I have looked for two years. The prices are tremendous. I

know I have been from one end of Charleston to the other and I do not wish to move on the outside of the city.

Q. Didn't you feel that it was good for the community to put the road through there and help clean things up there? A. Well, you can look at that two ways. I believe in expansion, sure. Sure.

Q. Did you read this complaint that they filed here?

The Court: That's not a fair question.

Mr. Preiser: He swore to it. This is a verified complaint.

Mr. Boettner: Your Honor, if I may, Mr. Bayes [420] signed an in forma pauperis affidavit which is filed with the Court along with the petition to proceed in forma pauperis.

Mr. Preiser: There is a verification where he says, "being first duly sworn, that the facts and allegations contained therein are true."

The Court: I will let you inquire as to the background of it but I am well enough acquainted with the practicalities of law practice to know—

Mr. Preiser: I was going to inquire as to each paragraph just to see if he read it.

The Court: Go ahead.

Q. Did you read this complaint before you swore to it? A. Is this my complaint or the other persons' complaint?

Q. There is only one complaint. I have handed you here a copy of a complaint which names you as one of the plaintiffs. I want to know whether or not you read it or had it read to you before you swore to the fact that the things therein contained are true. A. Well, Attorney, I will put it like this. I think this was read to me in a meeting. Per-

sonally I didn't read it. There was several meetings of this TIC at the time. No, I didn't read it.

Mr. Preiser: That's all. Thank you, your Honor.

The Court: Any questions?

[421] Mr. Boettner: Just a few questions, your Honor.

Mr. Bayes, this verification that you did sign was attached to the complaint, was it not?

The Court: Well, it is.

Mr. Boettner: Therefore you did have an opportunity to read the complaint?

The Witness: True.

Mr. Boettner: That's all.

The Court: You may step down, Mr. Bayes.

(The witness was excused.)

The Court: Gentlemen, we are going to have to take another recess until 4:15.

(Recess from 3:25 until 4:20.)

Mr. Davidson: Your Honor, in conversation with the Clerk it appears that two exhibits identified were not marked as admitted. We would like to inquire as to their proper status. The first is Plaintiffs' Exhibit Number 22. They are federal regulations governing the approval of workable programs. Whether admitted in evidence or not, they are matters of public record but for ease in—

The Court: They are incident to what type of program?

Mr. Davidson: They govern all HUD programs, but the reason they were offered they do require information about [422] all governmental programs.

Colloquy

The Court: But it is incident to the HUD program?

Mr. Davidson: Yes.

The Court: All right. It will be admitted.

Plaintiffs' Exhibit Number 22

The exhibit referred to, previously marked for identification, was admitted in evidence.

Mr. Davidson: And the second was the affidavit prepared by Carol Tillman which was first offered and rejected but then if I recall Your Honor after she testified as to the summary of the results of the phone survey she conducted, this then was offered to show the specific contacts and results and you admitted it as collateral.

The Court: That's right.

Mr. Davidson: Thank you.

The Court: All right, gentlemen.

Mr. Preiser: Defendants Ritchie, Colan and Hamill have no further evidence to offer on these two issues.

Mr. Upton: Your Honor, the defendant John Volpe and the defendant Francis C. Turner, the Acting Director of the Bureau of Public Roads, are willing to rest at this time with the understanding that we had I believe at last Saturday's hearing.

Mr. Hannon has been present here pursuant to the [423] Court's insfructions to respond to his affidavit if anybody desired to call him. That was in regard to the issue of the location and the public hearing. I have yet to fully understand the plaintiffs' position in this regard, but Mr. Hannon has been present,

his affidavit is in the file and if there is no challenge to that affidavit, we are ready to rest.

Mr. Davidson: The reason he is not called, the issues were narrowed to the problem of displacement.

The Court: All right.

Mr. Upton: With that understanding we rest.

The Court: Anything further?

Mr. Jones: The city has nothing.

The Court: Gentlemen?

Mr. Davidson: No further testimony, your Honor. We would like to inquire as to what an appropriate briefing schedule would be.

The Court: We have several matters to clear out of the way before I reach the briefing schedule.

First and foremost would be the motion for a temporary injunction. You gentlemen will recall I denied the motion for a temporary restraining order. While I have a motion for a temporary injunction and also motions to dismiss, I just wonder if it wouldn't be appropriate to consider the matter submitted on the merits. I don't know whether counsel [424] have any objection to that or not.

Mr. Upton: Your Honor, it is agreeable with the clients I represent, with the understanding there will be no restraining orders entered in the meantime while the Court is considering the case on the merits.

The Court: But you have no objection to the submission of it on the merits in the light of the record as it presently stands?

Mr. Upton: That is correct.

The Court: Mr. Preiser: Your Honor, our position on behalf of Messrs. Colan, Ritchie and Hamill would be identical to that as stated by Mr. Upton.

Mr. Jones: That's agreeable with the City of Charleston, your Honor.

The Court: Gentlemen?

Mr. Davidson: Yes, we would, with the request we have an opportunity to brief the issues.

The Court: That's what I meant, gentlemen. It appeared to me that it would be wasteful to go through the travail of yesterday's somewhat lengthy session and the evidence that's presented here today and still have the whole thing cast in the context of either a temporary injunction motion or on the motion to dismiss. I think we have developed [425] the record fully enough to consider the case submitted on its merits and, of course, with the opportunity for counsel to brief it on that point. As I understand, that is agreeable to counsel.

Mr. Davidson: Yes, that is, your Honor.

The Court: Counsel for the plaintiffs had filed a motion to amend the complaint from a jurisdictional standpoint to supplement the jurisdictional allegations by reliance upon certain sections of the Administrative Procedure Act. The Court denied that motion.

I have concluded, and especially since counsel are agreeable to submitting the case on its merits, in view of the breadth that the courts have seen fit to extend to the Administrative Procedure Act jurisdictionally in the federal courts and in the light of the record as it presently stands in this case, I am going to reserve myself on my position on the Administrative Procedure Act and permit the amendment as originally proposed by counsel for plaintiffs to rely upon that as a jurisdictional ground in addi-

tion to the jurisdictional grounds and allegations in the original complaint.

Will you gentlemen see to it that that goes into an order because I think possibly in the aspect of the relocation question that matter will be the only jurisdictional ground you have, and since I want to dispose of it on the [426] merits I think that that would be the only appropriate course for the Court to take. I will confess from a cursory reading of the cases I think that the courts have been inclined to view the APA in that light and in that breadth, so you gentlemen include that as one of the items in your order on today's session.

The motion to dismiss will be denied because I am going to consider the entire case on the merits.

Before I address myself to the motion for a temporary injunction there are one or two observations that I want to make. To me it's somewhat frightening to observe what I have seen take place here in court the last two days. When the federal establishment gets into so many areas, proliferates to such a degree that it becomes apparently unmanageable, I think it is a matter of concern to everybody and it is a matter of concern to me not only as a judge but as an individual.

Here we have such a paradoxical situation where the State Road Commission, supported by the taxpayers of the state, is engaged in participation in the federal road program, supported to a large degree by the federal government. They have, I think, from the record at least it seems to me, given this thing extreme study.

Of necessity the Congress had to invest in the [427] Bureau of Public Roads and these other agencies a certain degree of discretion in carrying out these programs. Then we have litigation in which other areas of federal endeavor and other agencies funded by the federal government are placing the action of these gentlemen under attack.

I don't mean to infer by that that any group or any citizen should be denied adequate representation to attack any action, whether it be of the federal government or the state government or the two of them, but to me for the federal government to sponsor a far-reaching program and then have to spend 800 and some man hours and the state government an equal amount to defend attack from any agency which is likewise funded by the federal government is bureaucracy gone mad. I simply make that as an observation. I think it is ridiculous.

* * *

[428] On the motion for temporary injunction the evidence shows that as far back as 1964 this highly controversial interstate system was approved in general to come through the valley and unfortunately through the City of Charleston, and when I [429] say unfortunately I mean that's my personal observation. I think these young men are already aware of my feelings on that. My personal feeling is that it was unwise. Unfortunately apparently other people feel that it was not unwise.

In any event it has long since been finalized and as the exhibits in this case show and as the Court well knows, the line or channel of the interstate

from Dunbar weaves its tortuous way across the Kanawha River and into South Charleston, cutting across Fort Hill and up Bigley Avenue. There already has been extensive demolition, as anybody knows who has driven over that area. Extensive demolition has taken place up in the Piedmont Road area.

What we have here are some individuals who apparently did nothing about this thing, that is, take any legal action, until this whole thing had become crystallized and had reached the Elk River, so to speak.

Counsel for the plaintiffs upon inquiry from the Court have indicated that they do not urge upon this Court that through the Triangle area, with which we are here concerned, the action of the Bureau of Public Roads or the State Road Commission had as its primary thrust any violation of the civil rights or any invidious discriminatory purpose toward the people who lived there.

They have suffered and will suffer dislocation as a [430] result of this particular channel. There are other citizens in the town who I am sure are quite unhappy with it but who likewise suffer not as dramatic an imposition upon their lives, but certainly disruptive.

For this Court at this time to grant a temporary injunction and bring this entire interstate development to a standstill—and that would be the effect of it and you can't oversimplify it by saying it would be an easy thing to move it here or move it there—I think would be an untoward thing.

Ruling of the Court

There is one other thing that occurs to me, that raises some question in my mind. Counsel have largely relied upon, and indeed I think the only thing that they could rely upon at this stage is this relocation question. First of all I have serious doubts that as to the area with which we are here concerned the Highway Act of '68 would apply because of the things that had been accomplished and the degree of the development of the interstate on the effective date of the Act, August 23 of last year. That's the first question.

Secondly I was very much impressed by Mr. Colan of the State Road Commission and I have no hesitancy whatever in saying I think the State of West Virginia is quite fortunate to have him heading up this particular division. He indicated to me that he was a dedicated man, a knowledgeable man and a man who is carrying out a very, very difficult task in all [431] good conscience and with a degree of solicitude for the impact that this program makes upon all people.

Another thing that has impressed me in these two days of hearing is to what degree a sincere challenge is being made against this relocation program of the State Road Commission. Again I want to refer to this exhibit Ritchie 3. This is Mrs. Burton, who apparently was a tenant of accommodations that were abominable. As soon as the Road Commission acquired the title Mr. Lawton wrote a letter to them pointing out the conditions that he felt Mrs. Burton was living under and calling upon the Road Commission as having responsibility to correct them.

Apparently the Road Commission responded quite expeditiously when you consider the usual lag in these governmental agencies and responded to certainly the emergency aspects of Mrs. Burton's plight. Then when they obtained adequate relocation facilities for her she is advised by someone representing the plaintiffs that it would not be in her best interests to take them. As I say, it raises in my mind, gentlemen, serious questions as to the bona fides of at least some of the allegations in the complaint here.

This case was filed upon affidavits of several individuals and asked leave of this Court to proceed in forma pauperis and the Court granted that. I am satisfied myself [432] that some of these individuals were not entitled to that action on the part of this Court. I feel quite frankly that there has been an abuse of process to some degree. I don't intend to place any blame on Mr. Bayes or anyone else, any individual, but I want counsel to know that I take a dim, dim view of that sort of thing, especially when it results in the attaining of the subpoena power of this court gratis and having this group of men from the Bureau of Public Roads and the State Road Commission and the Mayor's office sit down here for two days during the course of this hearing.

I have no hesitancy whatever in denying the motion for temporary injunction. As to the case on its merits, counsel may submit their briefs on or before April 23.

There is one other thing. Last night Mr. Abeles said that he came down here the first time, and I

think it was incident to his activities relative to the Urban Renewal, but he came here under the aegis and was paid by some federal agency. Do you gentlemen recall what that was?

Mr. MacQueen: Your Honor, as I understand it, the Volt Corporation.

The Court: No, that was the second time. That was the one that really grabbed me.

Mr. MacQueen: Intercity Council.

The Court: Intercity Council?

[433] Mr. MacQueen: That's right.

The Court: And that I think he said was funded by the federal government. Is that right?

Mr. MacQueen: No, I don't believe so. That's a private organization. The Volt Corporation or the Tri-CAP AAY-CD as I understand it financed that trip as well.

The Court: The first trip?

Mr. MacQueen: Yes.

The Court: Is that federally financed?

Mr. MacQueen: Yes, your Honor, it is.

The Court: And the second time he came down what is the name of the corporation?

Mr. MacQueen: I think it is the Volt Corporation.

The Court: That's the one he said had a contract with the federal government to provide services such as his to organizations.

Mr. MacQueen: To anti-poverty organizations.

The Court: I just want to get that straight because, as I say, to me it is a most paradoxical situation, but in any event, gentlemen, is there anything

further that I can advise you in regard to an appropriate order?

Mr. Davidson: Your Honor, I inquired of the Clerk whether certain exhibits could be withdrawn for copying at something less than the federal rate. There is a xerox [434] machine available. The Clerk informed me she would need your consent to temporarily withdraw them from the Courthouse. May that be obtained?

The Court: Which ones do you want to copy? memoranda submitted through Mr. Saunders, some of which were read this morning into the record.

Mr. Davidson: They were as particular in the I believe they are Plaintiffs' Exhibits 11 and 12 and also Plaintiffs' Exhibit 3.

The Court: They are all xerox copies anyway, aren't they?

Mr. Davidson: Yes.

The Court: Will you gentlemen supply to these men xerox copies of these particular exhibits?

Mr. Preiser: Mr. Saunders' exhibits, your Honor?

The Court: I think so.

Mr. Preiser: I don't know that I have them.

The Court: Do you have them?

Mr. Upton: I don't know that I have copies now, your Honor.

The Court: I would prefer that you do that. I would prefer to keep the record intact.

Mr. Upton: For the purpose of the record right now, on my obligation, will this gentleman define to the Court exactly what he wants?

[435] The Court: Itemize it because otherwise you will have to pay the federal rate.

Mr. Davidson: That will be Plaintiffs' Exhibits 3, 5, 6, 7, 10, 11 and 12.

The Court: You understand now, Mr. Upton?

Mr. Upton: Yes, your Honor.

Mr. Davidson: Will the others be available in the Courthouse?

The Court: They are always available in the Clerk's office for any attorney in the case to inspect.

Miss Bratton, will you transcribe the remarks of the Court from the outset and you gentlemen in drafting your order may incorporate the remarks of the Court by reference in ruling on the motion for temporary injunction.

Anything further, gentlemen?

Mr. MacQueen: Your Honor, I have one last question. Our motion for amendment contained a typographical error and I wonder, not being knowledgeable about this, is it critical and should we substitute a more accurate copy?

The Court: You may resubmit but I would not say that was critical. What is it?

Mr. MacQueen: We cite the Administrative Procedure Act as 28 U.S.C. 1653, which was the section we were in fact relying on for the propriety of amendment rather than the [436] substantive aspect. It is on the second page.

The Court: What date did you submit that?

Mr. MacQueen: 20th day of March, your Honor.

The Court: It was filed in the Clerk's office on March 24th. I don't even know whether any order was ever entered. Was any order ever entered, gentlemen, denying the motion to amend?

Mr. Upton: Your Honor, I think that order has been circulated here today and I don't know where

it is right now. I know I signed it and I know Mr. Hunt signed it but I don't know what has happened to it.

The Court: Your motion says that "pursuant to Rule 15 F.R.C.P. and 28 U.S.C. §1653 to amend the complaint in the above styled action to show jurisdiction under §10 of the Administrative Procedure Act, Title 5 U.S.C. §706."

Mr. MacQueen: Under paragraph 2, your Honor, we cite Title 23 U.S.C. 1653.

The Court: Title 28 you have got.

Mr. McQueen: Title 28, and that's improper. It should be Title 28 U.S.C. §701 through 706, which is the Administrative Procedure Act of Title 5.

The Court: Title 5, yes, was it Title 5, Mr. Davidson? Will you check me on this Title 5 in place of Title 28?

[437] Mr. Davidson: Yes.

The Court: Section 701.

Mr. Davidson: And sequence.

The Court: I would say 701 et seq. Would that be sufficient to cover it?

Mr. Davidson: That is correct.

The Court: 701 et seq. Gentlemen, I will just initial o.k. on the side of it and I have amended it for you. Apparently the order has not yet been entered denying your motion, so if it hasn't you gentlemen may just want to tear it up and include in your order on today's proceedings the Court granting the motion or upon reconsideration—any manner in which you want to handle it.

Anything further, gentlemen?

Colloquy

Mr. Preiser: We have nothing further.
Mr. Upton: Nothing further.
The Court: Very well then. We will adjourn.

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[438] I, Betty Bratton, official reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of the evidence introduced and proceedings had in the trial of the case of Triangle Improvement Council, et al. v. William S. Ritchie, Commissioner, State Road Commission of the State of West Virginia, et al., on the 2d and 3d days of April, 1969, as reported by me in shorthand.

Given under my hand this 21st day of April, 1969.

/s/ Betty Bratton

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Petitioners,

v.

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 14, 1970. Petition for rehearing was denied July 14, 1970.

Opinions Below

The opinions and orders of the courts below are as follows:

1. Memorandum opinion of the district court filed July 3, 1969, unreported (1a-25a).
2. Order of the district court filed July 18, 1969 (26a-27a).
3. Order of the Court of Appeals filed April 8, 1970 (28a-29a).

4. Opinion of the Court of Appeals filed May 14, 1970, not yet reported (30a-31a).

5. Judgment of the Court of Appeals filed May 14, 1970 (32a).

6. Order of the Court of Appeals denying motion for rehearing *en banc* filed July 14, 1970 (33a-35a).

7. Dissenting Opinion of Judge Sobeloff joined by Judge Winter (36a-42a).

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1970 (32a) and the petition for rehearing was denied on July 14, 1970 (33a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Petitioners, residents of the black ghetto of Charleston, West Virginia, are soon to be displaced by the construction of a federally aided interstate highway. They will be required to obtain new housing in a discriminatory market from which they are excluded because of race. This case presents the fundamental constitutional question of whether the Fourteenth Amendment requires that when persons are removed from housing by state and federal action and thereby subjected to private housing discrimination, government officials must first provide relocation housing available to them without regard to race. Additionally, petitioners are among the class of persons protected by the amendments to the Federal-Aid Highway Act of 1968, 23 U.S.C. §501 *et seq.*, which requires adequate assurances of relocation housing prior to their displacement by highway construction, and by the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, which requires federal agencies

to administer all activities relating to housing so as to further the national policy of fair housing. Relying on a no longer effective regulation, the United States Department of Transportation and the State Road Commission refused to provide such assurances, and the district court denied relief. The Court of Appeals affirmed, notwithstanding an intervening change in the regulations sustaining petitioners' position. Cf. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969). Under these circumstances, and especially where a precise statutory remedy is available to cure a constitutional wrong, are petitioners entitled to the relief which Congress has provided and which the Court of Appeals apparently acknowledged is their due?

Statutes and Regulations Involved

This case involves the Federal-Aid Highway Act of 1968, 23 U.S.C. §501 *et seq.*, particularly §§501, 502, 504(b), 508, 510 and 511 (3) (43a-46a), and the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, particularly §3608 (47a).

This case also involves the following regulations and policy directives issued by the Department of Transportation:

(1) Instructional Memorandum 80-1-68, ¶¶1, 2a. and b., 3, 4b., 5, 7, and 13, September 5, 1968, as amended by Instructional Memorandum 80-1-68(2), November 15, 1968 (48a-57a).

(2) Circular Memorandum, February 12, 1969 (58a-59a).

(3) Memorandum on Implementation of Replacement Housing Policy issued by Secretary of Transportation John A. Volpe, January 15, 1970 (60a-61a).

(4) Circular Memorandum, March 27, 1970, as amended, April 10, 1970 (62a-63a).

Statement

1. Summary of Proceedings in the Courts Below

Petitioners,[1] threatened with displacement by I-77, an interstate highway routed through Charleston, West Virginia's black ghetto, the Triangle, brought this class action on December 3, 1968 in the United States District Court for the Southern District of West Virginia. It challenges the failure of federal and state officials to assure, in accordance with the Fourteenth Amendment and the relocation housing requirements of the Federal-Aid Highway Act of 1968, the availability of relocation housing on a non-discriminatory basis for people evicted from their homes by highway construction.[2]

The evidentiary hearing on petitioners' motion for a preliminary injunction, April 2-3, 1969, focused on the refusal by federal highway officials to require the West

[1] The named petitioners are Keith Kincaid, Tennis Hogans, Robert Bayes, Katie Dean, Sedalia Haynes, and Lillian Day. The last named petitioner, Lillian Day, is white and represents the interests of low income white displacees. Individual petitioners are joined by the Triangle Improvement Council, an organization representing the Triangle community, and its officers.

[2] The complaint also challenged the adequacy of public hearings on the highway route and the failure of federal and state highway officials to consider the adverse social effects of the highway as required by 23 U.S.C. §128. Prior to the hearing on the motion for a preliminary injunction, the district court limited petitioners' proof to the problem of relocation housing (3a, 5a-6a, 10a-11a). This limitation on petitioners' proof, in effect a partial summary judgment made without any proceedings to determine whether triable issues of fact existed, was not appealed. The constitutional challenge related to the relocation housing problem—the denial of equal protection to blacks by their displacement into a racially discriminatory housing market without adequate governmental measures to assure the availability of alternative housing—was rejected by the district court (22a-25a), and although fully presented to the Court of Appeals, not discussed in its opinions.

Virginia State Road Commission to prepare and submit to the United States Department of Transportation for its review a relocation plan, as described in the Department's own regulations, which factually analyzes the problems of relocating displacees and proposes feasible methods to solve such problems. Federal and state officials defended their actions by contending that no relocation plan is required for the Triangle because federal *approval* of property acquisition in the Triangle preceded the passage of the Federal-Aid Highway Act of 1968, even though *actual* property acquisition and displacement in the Triangle prior to the Act's passage was negligible and actual construction of the highway had not yet been authorized. At the conclusion of the hearing on the motion for a preliminary injunction the case was submitted on the merits.

The district court ruled that the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, authorizes judicial review of actions of the Department of Transportation and that road displacees have standing to challenge the Department's failure to comply with federal relocation laws (12a-15a). On the merits, however, it dismissed, relying on one provision of the Department's regulations which purports to excuse federal authorities from following the otherwise applicable procedures for assuring the availability of relocation housing in situations where the *approval* of right of way acquisition preceded the 1968 Act. (Instructional Memorandum 80-1-68 (5)(b), (52a)). The court observed that both federal and state highway officials "interpreted the statutory and regulatory language to mean that the relocation requirements of the 1968 Act were not applicable to the particular projects here in question since final authority for right-of-way-acquisition was given long before the 1968 Act was passed" (19a). Without discussing in any detail petitioners' arguments that this administrative regulation undermines the clear intent of Congress to protect

all persons displaced after the passage of the 1968 Act, the district court ruled "that the agency's determination had a rational basis and should not be disturbed" (21a). Finally, even in the absence of compliance with the procedures required by the 1968 Act and the Department's regulations to determine whether replacement housing actually existed, the district court independently concluded "that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor" (23a). The district court's judgment of July 18, 1969 dismissed the complaint from the court's docket (26a-27a).

Prior to the hearing on petitioners' appeal to the United States Court of Appeals for the Fourth Circuit, petitioners' interpretation of relocation requirements was validated by the Department of Transportation. It issued new relocation regulations—a policy directive from the Secretary of Transportation and an implementing memorandum from the Federal Highway Administration—which acknowledge the immediate applicability of the 1968 relocation amendments to all projects on which *construction* has not been authorized even if *authorization to acquire* property had been granted prior to the 1968 Act (60a-63a). Petitioners became aware of the new policy upon reading newspaper reports of a departmental press release and requested a copy of the Secretary's new policy directive. The federal defendants only produced the policy directive after being required to do so when the Court of Appeals on April 8, 1970 ordered that the new regulations be made part of the record on appeal (28a-29a).[3]

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[3] The reticence of the federal defendants in this regard included first denying to petitioners' counsel that the regulations even existed, and, after changing that position, filing a lengthy memorandum in the Court of Appeals, opposing petitioners' motion for their production. *Cf.* Opinion of Sobeloff, J., 41a, n. 6.

The Court of Appeals on May 14, 1970 filed a one sentence opinion affirming "on the opinion of the district court" (30a-31a). On July 14, 1970 petitioners' petition for rehearing en banc was denied without opinion (35a). Judge Sobeloff, joined by Judge Winter, dissented.

Although there was no majority opinion, the reasoning of the court and the majority was set forth in the dissent without contradiction. Judge Sobeloff's opinion reports that the entire court agrees that in light of the Department of Transportation's new regulations, (1) the "satisfactory assurances" of the state that relocation housing is available which the Federal-Aid Highway Act, 23 U.S.C. §502, requires before federal officials are permitted to approve highway projects "may not be merely vague or general promises" but must be a well documented and factual plan which either demonstrates the availability of alternative housing or proposes specific measures to obtain it (38a); and (2) that review and approval of a relocation plan is not limited to the early stage of property acquisition, but must be repeated prior to the approval of construction (39a). As Judge Sobeloff describes the court's unanimous conclusion:

> There is, of course, no dispute within the court that the appellants' [petitioners here] position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved (41a).

Furthermore, the opinion makes clear that the requirement of a comprehensive relocation plan is not met by the district court's substitution of its independent conclusions on the availability of housing, for the "precise, effective administrative procedure for evaluation of the adequacy of proposed replacement housing" established by Congress (37a, n.2).

Judge Sobeloff explains the majority's affirmance by its apparent conclusion "that the new regulation, expressly recognizing plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief" (41a-42a). Believing "that there is no reason to suppose that the new policy will not be applied to the Triangle" the majority seemed to have concluded to itself that petitioners' "claim is thus mooted, at least for the time being" (42a). In contrast, Judge Sobeloff found in light of the position taken by federal highway officials even after the change in regulations that no relocation plan is required, that "the question is anything but moot . . . On the contrary, the defendants' refusal to accord the plaintiffs' their rights cries out for redress" (*Ibid*).

Just a few days before the denial of the petition for rehearing the West Virginia State Road Commission resumed demolition of houses in the Triangle. A community protest resulted in arrests and an order on July 10, 1970 from Secretary John A. Volpe to the State Road Commission to halt demolition in Charleston. The same day the State Road Commission notified the Department of Transportation that it would disregard the order and continued with demolitions.[4] No federal action was taken to enforce the order, and petitioners moved in the Court of Appeals for an injunction enjoining evictions and demolitions pending the disposition of this petition for certiorari to protect the substantial number of persons not yet displaced. On August 20, 1970, Judge J. Braxton Craven, Jr., a member of the original panel which heard the appeal, denied the requested stay on the ground that such a "substantive" stay pending this Court's decision on the instant petition should be con-

[4] The federal directive and the state response are appended to the Response of Federal Appellees to Motion for Stay Pending Review on Certiorari, as filed in the Court of Appeals.

sidered only by a member of this Court. An application to the Circuit Justice for such a stay is being presented simultaneously with the filing of this petition.

2. Summary of Facts

I-77 is being constructed as part of the interstate highway system and the federal government is assuming 90% of the highway's costs. Under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. §101 *et seq.*, there are two major stages at which federal approval of state plans is required, after route selection itself: (1) immediately prior to right-of-way acquisition, and (2) prior to actual construction (39a). Although federal authorization to acquire property in the Triangle had been given to the West Virginia State Road Commission in 1966 and 1967, the stage involving approval of actual construction plans has not been reached.

Between the time of approval of right-of-way plans and now, the West Virginia State Road Commission has engaged in some acquisition, displacement and clearance in the Triangle. Little actual acquisition preceded the passage of the highway relocation amendments in August 1968, no more than 9 of 65 parcels to be acquired having been acquired by that time (Plf. Exh. No. 4). As of the district court hearing in April, 1969, only 17 of the 300 persons who will be displaced from their homes had been displaced, and only 9 additional parcels had been optioned to the state and one condemnation action begun (Def. Ritchie Exh. No. 1; Plf. Exh. No. 4). Even at the time the appeal was argued before the Court of Appeals in May, 1970, petitioners counted 262 persons remaining in the right-of-way. Following the Court of Appeals' affirmance displacement accelerated and by the time the court denied the petition for rehearing in July, 1970, 189 persons (150 by federal defen-

dants count) remained to be displaced. Presently, at least half the displacements of people, 60% of the demolition of buildings, and federal approval of construction remains before construction may actually begin.

The problem presented to the Triangle by these displacement plans is of grave national importance and exceedingly important in Charleston. The Triangle is the largest black community in West Virginia and its residents are hindered by racial discrimination and poverty in their search for alternative housing in a city where the shortage of available low income housing has been well documented by federal studies (36a, Plf. Exh. Nos. 14, 16). The shortage has worsened, as Judge Sobeloff notes, as a variety of governmental programs cause extensive demolition throughout the city (36a). In the Triangle the situation is especially critical. The combination of previous acquisition by a public water company, extensive clearance in a recently approved urban renewal project, and the highway will, when all projects are completed, displace *all* of the Triangle's 2000 residents (Def. Ritchie Exh. No. 1).

These critical problems have been well known to federal highway officials. Shortly prior to the adoption of the 1968 Act the federal officer in charge of relocation programs in West Virginia analyzed Charleston's relocation housing problems and found "that the private housing market is about saturated presently", "that the relocation problem in the Charleston area, insofar as the State Road Commission is concerned, could become critical in the not too distant future", and that "the available replacement housing in this area is being depleted and no new sources are available at this time" (Plf. Exh. No. 12). Yet, no remedial action was ever required.

Heedless of these problems, the Department of Transportation decided not to require any systematic planning

for relocation housing after the passage of the 1968 Act. Instead, federal highway officials relied mainly[5] on the availability of short term rent supplements to temporarily subsidize displacees in expensive housing that they could not normally afford. The federal division engineer testified that without rent supplements "I'm not at all sure they could have gone through with the relocation program in the area" (Tr. 414). However, there are no plans to permanently rehouse displacees after the two-year supplements expire (Tr. 414-15).[6]

The district court based its finding that adequate relocation housing exists on its conclusion that public housing could be used to rehouse all displacees even though all that the West Virginia State Road Commission was willing to assert is that a "majority" of Triangle displacees "appear" to be eligible for public housing (Def. Ritchie Exh. 1). Beyond this "finding" the district court relied on oral assurances to the court during the hearing that relocation activities will be lawfully conducted, assurances which the court "assumed" were given "in good faith" (22a).

The Department of Transportation's own regulations, which implement the statutory obligation of assuring the availability of relocation housing provide a basis for determining the nature of relocation problems and proposing methods for solving such problems. The relocation plan must first describe the methods and procedures used by state highway departments to assess the needs of displacees

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[5] When asked whether the housing problems described above had changed, the only change cited by the division engineer, the chief federal highway officer in West Virginia, was the availability of rent supplements (Tr. 412-15).

[6] In some instances, these rent supplements have been denied by the State Road Department, on the ground that the replacement housing, although more expensive, did not meet the Department of Transportation's standards of "decent, safe and sanitary" housing.

and the availability of housing (IM80-1-68 (7) (b) (1) and (2) (53a-54a)). Then state highway departments are required to conduct surveys using approved methods and on the basis of these surveys formulate a relocation plan. The plan should describe problems revealed by the survey, analyze federal and other governmental programs affecting the availability of housing, propose solutions to problems and demonstrate that the plan is adequate "to carry out a timely, orderly and humane relocation program" (IM-80-1-68 (7) (b) (3) (54a-55a)). Yet, in spite of the availability of this precise method of implementing the statutory scheme no relocation plan has been required by federal highway officials.

When on two different occasions the West Virginia State Road Commission did submit fragments of deficient relocation plans to federal highway officials, no action was taken to require their improvement. The first time, shortly prior to the passage of the 1968 Act, federal officials requested information on relocation problems and the state provided what the federal relocation officer in West Virginia could only characterize as "one-half of a relocation plan" (Tr. 63). The federal officer further testified that no action was taken to secure the other half of the plan because "it was not considered in our opinion required that they have a complete one" (*Ibid.*). Then subsequently, when state officials prepared a "relocation plan" in response to the lawsuit (Tr. 359) the federal relocation office did not review it and upon being asked whether he had "seen" it answered only: "I have seen it. That's about all." (Tr. 116)

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Assure the Effectuation of an Act of Congress Designed to Provide Adequate Relocation Housing for Persons Displaced by Federally Aided Highway Construction and Prevent Discrimination Against Minority Group Displacees in Violation of Both the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act of 1968.

This case presents a fundamental constitutional question which was presented to the Court of Appeals and decided against petitioners without discussion: does the Fourteenth Amendment require government officials to assure the availability of relocation housing to racial minorities removed from housing by state and federal action and victimized by a racially discriminatory housing market? There is a conflict on this question between the Fourth Circuit, which in this case by its silence decided it adversely to petitioners, and the United States Court of Appeals for the Fifth Circuit, which in *Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969) decided that question in the affirmative. In *Arrington*, the displacement of black persons by a publicly assisted renewal project resulted in their being placed in a highly discriminatory housing market. Reversing the district court's granting of summary judgment for the city, the Fifth Circuit held that such state action was a denial of equal protection. Id. at 692-93. See also *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), holding that a municipal urban renewal which displaced black residents had a discriminatory impact because of discrimination in the private housing market.

The constitutional question fundamental to this case, however, can be avoided by giving effect to the statutes which petitioners submit control this case. The Federal-Aid Highway Act of 1968 provides for the relocation planning which petitioners submit should have been furnished in this case. Moreover, that Act and the regulations promulgated under it must be read in the light of the Fair Housing Act of 1968 which requires that all federal agencies act so as to insure that their activities affecting housing are carried out in a manner which will promote the national goal of fair housing.

The 1968 amendments to the Federal-Aid Highway Act are of great national importance. For years the problems of persons left homeless by interstate highway construction had caused nationwide concern. Prior to the passage of this Act, the highway builders had no obligation to give any assistance to those displaced by the roads. As Judge Sobeloff observed: "The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal" (36a). A series of studies by Congressional committees, federal departments, and independent agencies all confirmed that the burden of these displacements, fell most heavily on minority groups and the poor. E.g., Select Committee on Real Property Acquisition, *Study of Compensation and Assistance For Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, 88th Cong., 2nd Sess. (1964); Advisory Commission on Intergovernmental Relations: *Relocation: Unequal Treatment of People and Business Displaced by Government* (1965); United States Department of Transportation, *Highway Relocation Assistance Study*, 90th Cong., 1st Sess. (1967). With the acceleration of highway construction in urban areas Congress also noted, as observed by the sponsor of the 1968

Act, Senator Jennings Randolph, that "these dislocations and displacements caused by urban highways have been the cause of much of the discontent and unrest in our cities" (114 *Cong. Rec.* 8037). In response Congress declared in the Federal Aid Highway Act of 1968 that "the prompt and equitable relocation of persons . . . displaced as a result of . . . the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 23 U.S.C. §501.

The Court of Appeals apparently acknowledged that this important remedial legislation fully protects all persons not displaced as of the time of the Act's passage even if technical authorization to acquire property had been granted prior to 1968, and that the statute and regulations require the preparation and review of a comprehensive relocation plan (41a).

The relocation amendments were adopted twelve years after the interstate program began in 1956. Of the 41,000 miles in the interstate system, 26,000 had been constructed and 6000 more miles were under construction at time the relocation amendments were adopted. For the tens of thousands of persons already displaced by these highways the 1968 Act had no meaning. But the Act was designed to protect people living within the right-of-way of the remaining 9000 miles, of which 8500 were already in engineering design or right of way construction at the time the 1968 Act was adopted. 1968 U.S. Code Cong. Adm. News 4046. If the relocation provisions were to have any meaning, they had to be given full effect at once.[7]

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[7] At first the Department of Transportation narrowly construed the provision which requires the submission of "satisfactory assurances" from state highway departments that adequate relocation housing will exist prior to displacement before the Secretary of

The second issue on which the Court of Appeals, as reported by Judge Sobeloff, agrees with petitioners is that a relocation plan is required (41a). This conclusion is clearly correct, even though the Department's new policy directives and regulations do not speak specifically of a relocation plan. Instead they provide that the federal officials may not authorize any phase of construction, including demolition which will cause displacement, *or* permit the dislocation of persons from approved projects until adequately relocated (Circular Memorandum, April 10, 1970 (62a-63a)). The conclusion that a relocation plan is required derives from the fact that the relocation plan is the only mechanism by which problems can be analyzed with sufficient precision and also within sufficient time to allow remedial action. While a case by case appraisal of relocation problems at the time of displacement is undoubtedly

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Transportation may approve "any project", 24 U.S.C. §502 (43a-44a). It held this to apply only to an early phase of project approval including right-of-way acquisition. Petitioners contended that the intent of Congress requires application of the relocation amendments at any phase of project approval at which displacement was likely, especially the approval of actual construction. This contention was supported by 23 U.S.C. §504(b) (44a), which makes the act retroactively effective by requiring the amendment of previously executed project agreements and by 23 U.S.C. §511(3) (46a), which defines a "displaced person", the very individual protected by the Act, as "any person who *moves* from real property on or after the effective date of this chapter. . . ." (Emphasis added.)

While this case was pending in the Court of Appeals, the Department issued new regulations (60a-63a) which acknowledged the correctness of petitioners' position, and destroyed the rationale of the District Court's opinion which had been bottomed on deference to the agency's interpretation of the statute it was administering (19a-21a). Under the rule of *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969), the new regulations were apparently considered by the Court of Appeals to control the disposition of the appeal. (See 41a, esp. n. 3; 28a-29a).

salutary, it is no substitute for the kind of comprehensive planning prescribed by the Department's regulations.[8]

Yet, while recognizing the correctness of petitioners' legal position the Court of Appeals in its judgment affirmed the dismissal of the action. The affirmance was based solely "on the opinion of the district court" (31a), which Judge Sobeloff notes cannot "logically" serve as a basis of the appellate court's decision following the change in agency regulations (41a). Instead the Court of Appeals apparently ruled that petitioners' claim has been mooted because the court believed that federal and state officials would fulfill the relocation plan requirement.

This unarticulated belief was formed despite the clear refusal of federal officials to require and the review a relocation plan. In Judge Sobeloff's words:

> The question is anything but moot. The defendants have consistently taken the position, both before and during the litigation, that the state authorities need not submit and the federal officials need not review a formal relocation plan. They have continued to press this contention on appeal in spite of the policy change of which they were aware.

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[8] The Department of Transportation itself recognized the critically central role of relocation planning when it recommended to Congress, prior to the passage of the 1968 Act, that the need to require relocation plans in urban areas be met in legislation. United States Department of Transportation, *Highway Relocation Assistance Study*, 90th Cong. 1st Sess. 16-17 (1967). The Department regulations issued immediately after the passage of the 1968 Act implemented the relocation plan requirement. Subsequent directives provided for the formulation of relocation plans even after some displacement has taken place (Circular Memorandum February 12, 1969). Any interpretation of the Department's regulations which leaves any group of displacees without the essential protection provided by a relocation plan would be patently arbitrary and understandably rejected by the Court of Appeals.

> Moreover, they have been less than forthright in the course of this litigation. They resisted, without justification, producing the very memorandum of the Secretary that announced the new position and did not supply it until ordered to do so by the court. Under these circumstances I cannot think that court-ordered relief would be superfluous. On the contrary, the defendants' refusal to accord these plaintiffs' their rights cries out for redress (42a).

In fact, shortly after the denial of the petition for rehearing en banc federal officials reiterated to the Court of Appeals in their opposition to a motion for a stay pending certiorari that they would not require state officials to prepare a relocation plan.

Furthermore, as the dissent asserts, even if injunctive relief should be delayed to give federal officials an opportunity to comply with the law it was still incumbent on the Court of Appeals to declare the law as it was at the time the appeal was decided. Again, in Judge Sobeloff's words:

> Nor do I perceive any justification for the cavalier treatment accorded the appeal and the petition for rehearing. Even if injunctive relief is not appropriate this Court should not, by its silence, permit any possible implication that the obligations on the defendants have not been altered since the District Court's order. As I understand it, the affirmance is based on confidence that the defendants will perform their duty, not that they have none to fulfill. When the court acknowledges the duty but without explanation does nothing to enforce it, the decision will be read by some as a holding that there is no duty. At the very least the court should have explicated its rationale to under-

score the obligation and prevent misreading. Its failure to do so constitutes serious error (42a).

Moreover, the non-legal arguments raised by federal and state highway officials have little merit. They have asserted throughout this proceeding that compliance with the 1968 amendments would cause serious delay in the completion of I-77. Yet if, as they assert, adequate relocation housing exists, the preparation of a relocation plan by the state authorities and its review by the Department of Transportation should be a simple and rapid procedure, particularly in view of the fact that most of the data which would be required in the preparation of such a plan are already available from the Department of Housing and Urban Development, which prepared a similar plan in connection with a proposed urban renewal project. Indeed, such a plan could have been completed in a fraction of the time the present litigation has been pending. The necessary conclusions are that the preparation of such a plan would demonstrate the absence of acceptable relocation housing and the necessity for its being provided, and that petitioners are indeed justified in demanding compliance with the 1968 amendments.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Opinions and Orders Below

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CA 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA McLENDON, JUDY ECKLES, HENRY C. HAYNES, and LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

Plaintiffs,

VS.

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of Right of Way Division, State Road Commission of the State of West Virgnia; ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; JOHN VOLPE, individually and as Secretary of Transportation of the United States; LOWELL K. BRIDWELL, individually and as Administrator of the Federal Highway Administration of the United States and FRANCES C. TURNER, individually and as Director of the Bureau of Public Roads of the United States,

Defendants.

Opinion of District Court

MEMORANDUM OPINION

This dispute involves the location of a small segment of the Federal Interstate and National Defense Highway System as it is presently planned in a section of Charleston, West Virginia. The highway segment in question penetrates what is known as the Triangle area of Charleston which is populated predominantly by low-income families of the negro race. The disputed routing was approved in August 1964, and plaintiffs herein seek declaratory and injunctive relief against further steps for construction of the highway as presently routed.

Plaintiffs are a group of residents and citizens of the Triangle area and a local civic improvement association known as the Triangle Improvement Council (hereinafter TIC). The defendants include highway officials of the United States Department of Transportation (Federal defendants) and the State Road Commission of West Virginia (State defendants), and additionally, the City of Charleston, West Virginia, and its City Council and Mayor (Municipal defendants). The court recognizes that since this action was commenced certain personnel changes in the high levels of federal and state governments have resulted in different individuals being appointed to positions occupied by certain of the original defendants. Specifically, William S. Ritchie is now the Commissioner of the State Road Commission of West Virginia and John Volpe is now the Secretary of Transportation of the United States. Although Mr. Ritchie and Mr. Volpe have not been formally substituted as named defendants, the court recognizes such a substitution to be proper and accordingly makes such a substitution, pursuant to R. 25(d)(1), F.R.C.P.

The prime bases of the action are the alleged failure of the state and federal defendants to comply with the

relocation provisions of the Federal Highway Act of 1968, Pub. L. No. 40-495 (August 23, 1968), 23 U.S.C. Sections 501-511, and the alleged violation by the defendant of plaintiffs' constitutional rights under the Fourteenth Amendment. In addition, plaintiffs alleged a failure by the defendants to comply with the public hearing requirements of the federal statutes relative to the route selection for the interstate highway system in Charleston.

After an earlier denial of a motion by plaintiffs for a temporary restraining order, an evidentiary hearing was held on April 2 and 3, 1969, on a motion by plaintiffs for a preliminary injunction and motions to dismiss filed by the various defendants. The court being of the opinion that the allegations relative to the public hearing requirements were, based upon affidavits and exhibits submitted at the hearing on the temporary restraining order, plainly without merit, restricted the evidence in the proceedings on April 2 and 3 to the allegations relative to relocation; i.e., (1) failure to comply with the statutory provisions and (2) the constitutional equal protection question raised by plaintiffs relative to the relocation procedures.

Since this action was filed on December 3, 1968, a substantial number of motions, orders, etc. have been considered by the court and disposed of as follows.

Except for extensions of time within which to file answers, no formal action was taken in this proceeding until March 5, 1969. Prior to that time, however, certain collateral "side agreements" were made between counsel relative to the matter of interstate highway progress in the Trlangle area. Disagreements eventually arose relative to the breadth and import of the "side agreements," and on March 5, 1969 plaintiffs moved the court for a temporary restraining order which would have effected a cessation of all interstate highway activity in the Triangle area.

Certain broad subpoenas duces tecum were also issued on that date, directed to federal and state highway officials.

On March 10, 1969, a hearing on the motion for the temporary restraining order was held. At that time, motions to quash the subpoenas duces tecum which had been issued were filed and argued. As a result of that hearing, the court was of the opinion that injunctive relief would irreparably hinder the interstate highway program and that the subpoenas duces tecum were overly broad and oppressive. Accordingly, a motion for a temporary restraining order was denied and the motions to quash the subpoenas duces tecum were granted.

On March 10, 1969, motions to dismiss the complaint were filed on behalf of the federal defendants, the state defendants, and the municipal defendants. These motions were supported by certain affidavits and exhibits. At that time, the motion to dismiss the municipal defendants was denied, and other dismissal motions were held in abeyance, and a hearing on the dismissal motions and on a motion for a preliminary injunction was set for April 1, 1969. An order reflecting the March 10 actions of the court was submitted by counsel and was entered on March 21.

On March 13, the plaintiffs caused more subpoenas to be issued for certain federal and state highway officials for the avowed purpose of taking the depositions of those officials. The state and federal defendants moved to quash the new subpoenas, alleging oppressiveness and lack of time to comply therewith prior to the April 1 hearing. A hearing on the motions to quash was held on March 17, and the court, being of the opinion that the motions were well taken, granted them and thereby quashed the subpoenas. An order reflecting this action was entered on March 24.

On March 24, plaintiffs moved the court to be permitted to amend their complaint in order to allege jurisdiction under the Administrative Procedure Act, 5 U.S.C. Sections 701 et. seq. The court was of the opinion that this motion was tardily made, and it was denied by order of March 28.

Also on March 24, the plaintiffs filed motions for production of certain documents alleged to be in the possession of federal and state officials. The defendants, on March 28, moved that the motions for production be quashed by the court. The court heard these motions on March 29, and being of the opinion that it would be overly burdensome to require their production on such short notice prior to the hearing on this matter, denied the motions for production and granted the motions to quash. However, the court instructed the defendants to bring all relevant material to the scheduled hearing, in order that plaintiffs and the court might have the benefit of it. In addition, the hearing date was set over until April 2 in order to accommodate counsel for the state defendants. An order reflecting these actions was entered on April 28.

Prior to March 29, the court had met informally with counsel for the various parties, at which time counsel were advised that the court considered any challenge to the highway routing decision to be barred by laches, and that the court was of the opinion that the only allegation of possible merit made by plaintiff related to the displacee relocation assistance program being administered by the State of West Virginia. Counsel were accordingly requested to prepare for the hearing with that in mind, and so present only evidence which related to the relocation assistance program.

On March 29, plaintiffs filed a formal written motion with the court to the effect that they be permitted to present

evidence at the scheduled hearing on all the issues and theories of law embodied in their complaint. Such motion was denied, in accord with the court's previous decision to restrict evidence at the hearing to that which was material and relevant to the relocation issue. The denial of that motion was reflected in an order entered subsequent to the hearing, on April 28.

On April 2 and 3, the evidentiary hearing was held relative to the various dismissal motions and to the motion for a preliminary injunction which had been formally filed by plaintiffs on April 1. At the conclusion of the presentation of evidence, the court denied the various dismissal motions and the motion for a preliminary injunction. Counsel thereupon agreed to submit the case to the court on the record as then developed for decision on its merits. It was further agreed that briefs on the merits of the case would be submitted by April 23, which date was subsequently changed, on plaintiffs motion, to May 5. In addition, the court reconsidered its ruling relative to the denial of plaintiffs motion to amend its jurisdictional allegations. The order denying them the right to allege the Administrative Procedure Act, 5 U.S.C. Sections 701 et. seq. as a basis for jurisdiction in this proceeding was vacated and the motion to amend was granted. An order reflecting the court's actions on all of these matters was entered on April 29.

By May 8 all defendants had filed answers in this matter, counsel had filed briefs with the court on the merits of the case, and the case was submitted for final disposition.

Background Discussion

In 1956, the Congress of the United States provided for the construction of the extensive Interstate Highway

System. The statutory bases for the program were the Federal-Aid Highway Act of 1956 and the Highway Revenue Act of 1956. Numerous amendments have since been made to the original statutes, and, in 1968, the relocation assistance provisions were greatly expanded. Prior to 1968, however, much had transpired relative to the routing of the interstate system in the Kanawha Valley and Charleston, West Virginia, area.

Charleston was planned as the hub of the interstate system in West Virginia, and three interstate routes will converge on the Charleston area. Interstate Route 77, running north-south from Cleveland, Ohio to the southeastern United States, and Interstate Route 64, running east-west from coast to coast, both come through the Charleston area. The third Interstate Route, I-79, enters the Charleston area from the north, beginning at Erie, Pennsylvania, and terminating at Charleston.

Extensive planning, research, public discussion, and controversy was necessarily attendant upon the routing of these highways in the Charleston area. The record indicates that public hearings relative to these routes were held in Charleston on March 29, 1960 and June 10, 1964, and transcripts of these hearings have been submitted to the court. Prior to the 1964 hearing, numerous studies were made relative to the routing, the most important of which, the so-called TAMS study, was completed in early 1964. The proposed system recommended by the TAMS study was discussed at the 1964 hearing, and, along with nine alternate routes, was portrayed by maps, aerial photographs, and numerous exhibits. At the time of the 1964 hearing, the State Road Commission of West Virginia had indicated no preference among the suggested routes and it emphasized that none would be chosen until a study of

developments at the hearing was made along with other relevant data.

Consideration of the interstate system routing in Kanawha County and Charleston was concluded in August of 1964, with final approval of the Bureau of Public Roads being given on August 31, 1964. As approved, the routing of I-77 and I-64 (primary designation of the highway is I-77, secondary designation is I-64, and is hereinafter referred to as I-77) penetrates the Triangle area of Charleston. No protest from the plaintiffs in this action relative to that routing was made until December 3, 1968, when this action was filed.

Construction of the interstate highway system through the Triangle area involves two interstate projects of the State Road Commission. These two projects are designated I-77-3(66)100 (hereinafter Project A) and I-77-3(67)98 (hereinafter Project B). The evidence indicates that each of these projects involves part of the Triangle area, and while all of the Triangle area affected by the interstate system is located within the confines of these two projects, the entire area encompassed by these projects includes areas outside the Triangle.

The evidence indicates that the Bureau of Public Roads, in addition to approving the routing of the highway, is required to make certain step-by-step authorizations of funds to be utilized in the projects such as surveying, abstracting titles, acquiring rights-of-way, and various other aspects of the highway construction. In this regard, the two subject projects were in the right-of-way acquisition and displacee relocation stage when this action was commenced. The actual dates on which authorization for right-of-way acquisition was given were, according to the testimony at the hearing, as follows:

1. PROJECT A—(four separate authorizations)
   (a) April 19, 1966
   (b) September 22, 1966
   (c) January 27, 1967
   (d) May 23, 1967

2. PROJECT B—November 30, 1966

It is apparent, therefore, that complete authority for right-of-way acquisition in the Triangle area had been given by May 23, 1967, and had been in effect over a year prior to the enactment of the 1968 Highway Act.

At the time of the approval of the routing in question by the Bureau of Public Roads, the applicable statutory provisions relative to displacee relocation assistance was 23 U.S.C. Section 133. Compliance with that statute, enacted in 1962 in Pub. L. No. 87-866, was required before a state could participate in the federal financial assistance available for highway construction. Plaintiffs do not allege that the state defendants were not complying with Section 133, but contend that the provisions of 23 U.S.C. Sections 501-511 (Pub. L. No. 90-485), which repeals Section 133 now apply and are not presently being met by the state defendants. As noted, the new relocation assistance provisions (Sections 501-511) were enacted August 23, 1968, over a year after the last authorization for right-of-way acquisition was given the West Virginia State Road Commission by the Bureau of Public Roads.

The record in this case fails to indicate any complaints from the plaintiffs herein prior to the institution of this action relative to the highway location in the Triangle area.

The record does, however, indicate that State Road Commission officials met with TIC members and Triangle area residents in 1965 and discussed the impact that the interstate would have on that area. None of the questions raised in this action were raised at that conference.

The Routing Decision

As noted above, the routing of I-77 through the Triangle area was approved by the federal authorities August 31, 1964. Prior to that time, on August 20, 1964, the State Road Commission of West Virginia had finalized its determination of the manner in which the interstate system in Kanawha County and Charleston should be routed. The record in this action indicates that the State's routing determination complied with the federal statutory and regulatory requirements in effect at that time. They had made a comprehensive study of the matter, had held open and well-advertised public hearings, and had, as administrative officials must do, made the decision on the interstate routing. The federal government which pays for 90 percent of the cost of interstate highway construction approved the state action. The endorsement by the federal authorities of the state's routing decision is strong evidence that the proper procedure for highway planning and routing had been followed.

Furthermore, it is undisputed that the plaintiffs herein sat on their alleged rights for over four years until the interstate program was well into the right-of-way acquisition stage before seeking any judicial review of the administrative determination. I am accordingly of the view that the doctrine of laches precludes review of that decision at this late date, and that the only question of possible

merit raised in this instance relates to the displacee relocation procedure relative to those persons living in the I-77 corridor in the Triangle area.

Of further relevance on the question of undue delay by plaintiffs in bringing their action is the testimony by federal and state officials relative to the effect injunctive relief might have upon the entire interstate highway program in Charleston. The evidence indicates that such relief might delay completion of the system by as much as five years, would cause comprehensive new planning procedures to be initiated, would result in an additional financial burden of staggering proportions, and could result in a complete cessation of the flow of federal interstate highway-aid funds into this area of West Virginia.

The Relocation Questions

As noted above, the displacee relocation assistance provisions relied upon by the plaintiffs herein were enacted into law on August 23, 1968. Pursuant to its provisions, the Bureau of Public Roads issued Instructional Memorandum (IM) 80-1-68 on September 5, 1968, with an effective date of August 23, 1968.

In the two highway projects which affect the Triangle area, a substantial number of persons required relocation housing. Evidence presented at the evidentiary hearing indicated the following number of persons in Projects A and B either had been or were to be relocated, as of February 28, 1969.

In Projects A and B—as of February 28, 1969

	Project A	*Project B*	*Total*
To be relocated	380	496	876
Had been relocated	913	401	1,314
			2,190

Of these totals, however, not all are or were within the confines of the Triangle area as such. The figures for the Triangle area itself were as follows:

In Triangle area—as of February 28, 1969

	Project A	*Project B*	*Total*
To be relocated	104	180	284
Had been relocated	Not presented	Not presented	Not presented

The number of persons who had not been relocated from Projects A and B in the Triangle area as of August 23, 1968 (the enactment date of the Federal-Aid Highway Act of 1968, and BPR IM 80-1-68) was not presented. Accordingly, the number of persons relocated since August 23, 1968 was not determined.

Prior to consideration of whether the relocation program of the State Road Commission complies with 23 U.S.C. Sections 501-511 and BPR IM 80-1-68 is the question of whether those relocation provisions are at all applicable in the present controversy. Plaintiffs contend that the relocation provisions apply but are not being complied with, and, in fact, cannot be complied with; while defendants contend the relocation provisions do not apply to displacee relocation in Projects A and B in the subject area, and, in any event, the State Road Commission's displacee relocation program would satisfy those provisions.

JUDICIAL REVIEW

The plaintiffs allege jurisdiction in this court on the basis of federal civil rights statutes, 28 U.S.C. Sections 1981—1983, 2000(d), federal questions raised, 28 U.S.C. Section 1331(a), suits against officers and employees of

the United States, 28 U.S.C. Section 1361, the Administrative Procedure Act (APA), 5 U.S.C. Sections 701—706, and declaratory judgment statute, 28 U.S.C. Sections 2201 and 2202.

Without making a detailed analysis of each of these jurisdictional allegations, I am satisfied that judicial review of agency action pursuant to the federal highway program may be had. *Road Review League* v. *Boyd,* 270 F. Supp. 650 (S.D. N.Y. 1967). There is nothing in the federal statutes which indicates that Congress intended to immunize the Bureau of Public Roads from judicial scrutiny of its acts. As was stated in the recent case of *Western Addition Community Organization* v. *Weaver,* 294 F.Supp. 433 (N.D. Calif. 1968), which involved relocation of urban renewal displacees (at 442):

> "* * * The test for judicial reviewability, however, is not, as contended by defendants, whether the statute provides for it, but whether the statute precludes it. Federal administrative action is subject to judicial review unless the statute, itself, precludes such review."

Western Addition cites *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967) as authority for a basic presumption that judicial review is available to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. It points out that this rule has been reinforced by the Administrative Procedure Act. Judge Sweigert stated in *Western Addition* (at 442):

> "When no other remedy for judicial review is provided, persons suffering legal wrong because of administrative action or otherwise adversely affected or aggrieved by it within the meaning of a relevant stat-

ute, may proceed under the Administrative Procedure Act (5 U.S.C. Sections 701, 702, 704) except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law."

In this instance, as in *Western Addition*, there is no statute precluding judicial review. I am accordingly of the view that the administrative decisions involved in this matter are judicially reviewable under the Administrative Procedure Act, 5 U.S.C. Sections 701-706.

STANDING OF PLAINTIFFS

Prior to any consideration of the merits of this matter, brief review should also be given to the question of whether the parties bringing this action have standing to challenge the actions of the defendants. As it was put by the Supreme Court in its recent consideration of the standing problem, *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968):

"* * * In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. * * *".

Title 5 U.S.C. Section 702, the section of the Administrative Procedure Act relative to the "right of review," provides that:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Under this section, the Supreme Court has held that a person is "aggrieved" if he asserts a personal interest which the "relevant statute" was designed to protect. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968). The relevant statute involved here, which is the Federal Highway Act of 1968, particularly the relocation assistance provisions contained therein, clearly was intended to protect persons such as the plaintiffs in this matter.

Several recent cases have allowed litigants who were situated similarly to the plaintiffs herein standing to challenge government projects, particularly *Scenic Hudson Preservation Conference* v. *Federal Power Comm.*, 354 F.2d 608 (2d Cir. 1965), *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968), *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), and *Western Addition Community Organization* v. *Weaver*, supra. In addition, the Supreme Court has given a broadened scope to the Administrative Procedure Act in *Hardin* v. *Kentucky Utilities Co.*, supra, and *Abbott Laboratories* v. *Gardner*, supra. These cases would appear to have rejected the view expressed in such cases as *Green-Street Association* v. *Daley*, 373 F.2d 1 (7th Cir. 1967), and *Johnson* v. *Redevelopment Agency of Oakland*, 317 F.2d 872 (9th Cir. 1963), which would deny relocation displacees the standing to challenge governmental action relative to them.

In the light of the authorities cited above, I am of the view that under the broadened scope of the Administrative Procedure Act, the plaintiffs in this matter would qualify as sufficiently "aggrieved" under a "relevant statute" to permit this court to proceed with consideration of the merits of their claims.

THE STATUTORY QUESTION

As was previously stated, the basic question in this whole matter turns largely upon the applicability of the displacee relocation provisions of the 1968 Highway Act to the particular segments of I-77 which penetrate the Triangle area of Charleston. Plaintiffs, of course, assert that the provisions apply, while the defendants assert that they do not apply. An examination of the statute itself, and the administrative interpretations of it (IM 80-1-68), is appropriate to determine which of the parties should prevail on this issue.

In 23 U.S.C. Section 502, relating to "Assurances of adequate relocation assistance program," it is provided that:

> "The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that—
>
> (1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506 and 507 of this title;
>
> (2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and
>
> (3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and in-

> dividuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment."

The two statutory sections cited in the first sentence of Section 502 provide for the submission of certain plans, specifications, and estimates for federal-aid highway projects to the Secretary of Transportation by the state highway department. Those necessary to be submitted are to be such "as the Secretary may require," and his approval of them is deemed to place a contractual obligation upon the federal government.

In the instant case, the testimony of the Secretary's representatives was clearly to the effect that the West Virginia State Road Commission had complied with all federal requirements relative to right-of-way acquisition in Projects A and B in the Triangle area. In fact, as noted above, authority for right-of-way acquisition in Projects A and B was given by the federal government in 1966 and 1967, with the final authorization being given on May 23, 1967.

In 23 U.S.C. Section 504(b), the 1968 Highway Act provided that:

> "Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property."

In the Instructional Memorandum (IM 80-1-68) which the Bureau of Public Roads issued pursuant to the relocation provisions of the 1968 Highway Act, the following provisions relative to applicability were set forth in paragraphs 2b(1), 2b(2) and 5b:

"2. * * *

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights of way which are occupied by an individual, family, business, farm operator, or nonprofit organization.

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

* * *

"5. * * *

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum."

With specific regard to the West Virginia State Road Commission's efforts in this area, the testimony of both federal and state employees indicates to me that an active and continuing displacee relocation assistance program has been and is being carried out. It appears that such a pro-

gram was in effect even prior to enactment of the 1968 Highway Act. In any event, the West Virginia Road Commission personnel in authority in the area of relocation assistance, and the personnel in the West Virginia office of the Bureau of Public Roads, interpreted the statutory and regulatory language to mean that the relocation requirements of the 1968 Act were not applicable to the particular projects here in question since final authority for right-of-way acquisition was given long before the 1968 Act was passed. In particular, they felt that the correct position relative to applicability of the 1968 Act was set forth in paragraph 5b of IM 80-1-68, to the effect that:

> "The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum."

The defendants submit that even if there is a question as to whether the assurances were or were not required in this instance, the agency's construction of the applicable statutes and regulations should be given considerable weight and not be overturned unless plainly incorrect. They cite several cases in support of this position, including *Udall* v. *Tallman,* 380 U.S. 1 (1965), wherein Mr. Chief Justice Warren stated (at 16):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need

not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, e.g., *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

> 'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414."

I am convinced that this is a valid summary of the law in this area. I am further convinced, after analyzing the statutory provisions, their legislative history, and the instructional memoranda issued pursuant thereto, that Congress could not have intended that projects authorized and approved several years prior to the enactment of the 1968 statute were to be subject to inflexible and strict

compliance therewith. The administrative agency did not give it such an interpretation, and I am of the opinion that the agency's determination had a rational basis and should not be disturbed.

In any event, testimony of federal and state highway officials, especially that of the State Road Commission Director of Right-of-Way acquisition, O. R. Colan, indicates to me that the authorities are making a sincere effort to integrate the provisions of the relocation assistance provisions of the 1968 Highway Act into its program. Responsible public officials at both the federal and state levels testified forcefully and credibly that the West Virginia State Road Commission's displacee relocation program relative to the two projects affecting the Triangle area is in compliance with the provisions of the 1968 Act in a practical if not a formal manner, even though such compliance is not legally required. They assured the court that displacement would be conducted at a slow pace in order that appropriate replacement housing could be found, and that no one will be displaced unless suitable (i.e., decent, safe, and sanitary) and lawful relocation housing is available, and further that relocation assistance payments required by the statute would be made in all cases.

As mentioned above, this testimony indicates the federal defendants have determined that the West Virginia authorities can meet, are meeting, and will continue to meet the requirements of the regulations and statutes in its relocation program. As the case law indicates, such a determination is entitled to great weight and should be confirmed if premised on rational grounds. As many cases, including *Western Addition Community Organization* v. *Weaver*, supra, and *Road Review League* v. *Boyd*, supra, indicate, courts should not undertake the administration of complex

and far reaching federal programs, but upon appropriate judicial review should determine only whether the agency administering the program is in substantial compliance with the applicable statutes and regulations.

I should also reiterate that the evidence shows that as of February 28, 1969, only 284 persons were residing in the I-77 corridor in Projects A and B in the Triangle area of Charleston, West Virginia. It can be logically assumed that that number has been somewhat reduced in the period that has elapsed since February. In considering injunctive relief this court should, of necessity, weigh its possible beneficial effect upon this group of Triangle residents against its potential disruptive effect upon the program of the state and federal authorities charged with the responsibility of building east-west and north-south interstate highway corridors through West Virginia and the nation. The federal and state officials have assured the court that the persons residing in the interstate corridor in the Triangle will be dealt with in a manner that comports with the federal statutes and regulations, and I must assume that the highway officials gave these assurances in good faith. The evidence certainly supports such an assumption on my part.

The Constitutional Question

Plaintiffs further allege that even assuming that the State Road Commission's relocation program is lawful in other respects, it is being unconstitutionally administered insofar as it affects negro citizens residing in the I-77 corridor in the Triangle area. They allege that the dislocation of negroes into a "racially closed" housing market existing in Charleston constitutes a denial of equal protection of

the laws prescribed by the Fourteenth Amendment to the Constitution of the United States.

Without discussing this allegation in depth, I refer again to the representations made by the state and federal defendants to the court. They have assured the court that the relocation program can be carried out in complete compliance with existing law and that no racial discrimination will be practiced in the conduct of the program. Furthermore, I am satisfied from the evidence that the subject displacees from the I-77 corridor in the Triangle area can obtain housing within the range of their economic means without racial discrimination which would be of such a nature as to raise federal constitutional problems. It is clear that their greatest problem relative to housing is the basic lack of the financial means to secure such in many areas of Charleston. Many others, of all races, are faced with a similar problem, but this is not the result of invidious racial discrimination.

The evidence indicates that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor. I am satisfied that this evidence is accurate. Even should no housing be available for dislocatees in the private housing market, the evidence clearly demonstrates that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area.

Furthermore, evidence presented at the hearing on this matter suggests that some individuals in the subject corridor have refused offers of satisfactory and lawful relocation housing, unhappily in an attempt to further and improve the posture of this lawsuit. In at least one instance such refusal was at the request of counsel for plaintiffs

or their associates. This casts some question on the sincerity of the challenge plaintiffs have made to the relocation effort, and indicates that their primary objective is to block the interstate route which was finalized some five years ago.

Finally, it should be noted that the plaintiffs have specifically disavowed that there was any basic or specific racially discriminatory purpose on the part of defendants in the routing of I-77 or in the relocation of the displacees in that routing. There has been no showing that the location of this highway affects citizens of the negro race more adversely than it affects others in similar economic circumstances. That sufficient housing is available in the Charleston area to permit lawful relocation of all displacees, without regard to race, is sufficient to distinguish this case from the basic decision relied upon by plaintiffs, *Norwalk CORE* v. *Norwalk Redevelopment Agency*, supra. In that case the court ruled that a cause of action was stated when the plaintiffs alleged that the authorities were not even attempting to assure relocation for non-whites to the same extent as they were for whites.[1] In the present case

[1] "We do not understand plaintiff's constitutional argument to be that defendants must end discrimination in the Norwalk open housing market through the relocation plan, or even that defendants must find integrated housing for those displaced by the Project. Those are arguments we need not consider until they are appropriately put to us.

"What plaintiffs' complaint alleges, in substance, is that in planning and implementing the Project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree." (395 F.2d at 930).

the evidence that all racial groups are being provided relocation assistance on the same basis and to the same extent precludes, in my view, any valid constitutional question on this facet of this controversy.

I conclude that plaintiffs' allegations relative to the relocation assistance program on both the statutory and constitutional grounds are without merit, and accordingly the defendants are entitled to judgment on the issues and the complaint should be dismissed. This opinion will be filed as my findings of fact and conclusions of law on the issues presented, and counsel may submit an appropriate order incorporating this opinion by reference therein.

/s/ JOHN A. FIELD, JR.

JOHN A. FIELD, JR.
United States District Judge

Dated: July 2, 1969

Order of District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON
CA 68-183 CH

TRIANGLE IMPROVEMENT COUNCIL, a non-profit organization created and organized under the laws of the State of West Virginia, as an individual, by and in behalf of its officers and members, WILLIAM S. PRESTON, CLARENCE SMITH, REGINA McLENDON, JUDY ECKLES, HENRY C. HAYNES, and LESLIE BRADSHAW; and KEITH KINCAID, TENNIS HOGANS, ROBERT BAYES, KATIE DEAN, SEDALIA HAYNES and LILLIAN DAY, as individuals,

Individually and on behalf of all others similarly situated,

Plaintiffs,

VS.

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia; O. R. COLAN, Director of Right of Way Division, State Road Commission of the State of West Virgnia; ELMER H. DODSON, Mayor of the City of Charleston, West Virginia, THE CITY OF CHARLESTON, West Virginia, a city corporate and body politic; the CITY COUNCIL OF THE CITY OF CHARLESTON, the corporate board of that city; JOHN VOLPE, individually and as Secretary of Transportation of the United States; LOWELL K. BRIDWELL, individually and as Administrator of the Federal Highway Administration of the United States and FRANCES C. TURNER, individually and as Director of the Bureau of Public Roads of the United States,

Defendants.

Order of District Court

ORDER

This day came the parties by their attorneys and for the reasons set forth in this Court's Memorandum Opinion, dated July 2, 1969, which Memorandum is hereby incorporated and made a part herein, it is ORDERED by this Court that defendants are entitled to judgment on the issues and the complaint should be dismissed.

Accordingly, it is ORDERED that the complaint be dismissed and that this matter be removed from the docket of this Court.

To all of which plaintiffs do hereby object and except.

ENTER:

July 18, 1969

/s/ JOHN A. FIELD, JR.
United States District Judge

/s/ JOHN BOETTNER
Counsel for Plaintiffs

/s/ L. ALVIN HUNT
Counsel for Defendants,
William S. Ritchie, etc., and
O. R. Colan, etc.

/s/ W. WARREN UPTON
Counsel for Defendants
Volpe, Bridwell and Turner

/s/ B. DUFFY HORAN
Counsel for Defendant Dodson
and for Defendants City of
Charleston and The City Council
of the City of Charleston

Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of West Virginia.

ORDER

Appellants have moved to require the federal defendants (the Secretary of Transportation, the Federal Highway Administrator, and the Director of Public Roads) to produce a memorandum of the Secretary regarding new relocation policies. Upon consideration of appellants' motion, appellees' response, and appellants' reply, the court is of

the opinion that the document should be furnished to counsel and made a part of the record in this appeal. It is so ordered.

/s/ CLEMENT L. HAYNSWORTH
Chief Judge, Fourth Circuit

/s/ SIMON E. SOBELOFF
United States Circuit Judge

/s/ HERBERT S. BOREMAN
United States Circuit Judge

A True Copy, Teste:
Samuel W. Phillips, Clerk

By Beverly M. Newell
Deputy Clerk

FILED
APR 8 1970

SAMUEL W. PHILLIPS
CLERK

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia.
John O. Field, District Judge.

(Argued May 6, 1970 Decided May 14, 1970.)

Before BRYAN and CRAVEN, Circuit Judges and JONES, District Judge.

Michael Davidson (Jack Greenberg, John Boettner, A. Andrew MacQueen, III, Thomas J. O'Sullivan, Peter M. Collins and Steve Young on brief) for Appellants, and Walter

Opinion of Court of Appeals

H. Fleischer, Attorney, Department of Justice, (William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Wade H. Ballard, United States Attorney, L. Alvin Hunt, Stanley E. Preiser and Preiser, Greene, Hunt & Wilson on brief) for Appellees.

Per Curiam

We affirm on the opinion of the district court, —— F.Supp. —— (S.D.W.Va. July 2, 1969).

Affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

[Title omitted]

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SAMUEL W. PHILLIPS
Clerk

FILED
MAY 14, 1970
SAMUEL W. PHILLIPS
CLERK

A True Copy, Teste:

Samuel W. Phillips, Clerk
By WILMA UPSHUR
Deputy Clerk

[SEAL]

Order Denying Rehearing *in banc* With Dissenting Opinion

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of West Virginia. John O. Field, District Judge.

ORDER DENYING REHEARING IN BANC WITH DISSENTING OPINION BY SOBELOFF AND WINTER, CIRCUIT JUDGES.

JULY 14, 1970.

Before BRYAN and CRAVEN, Circuit Judges and JONES, District Judge.

Michael Davidson (Jack Greenberg, John Boettner, A. Andrew MacQueen, III, Thomas J. O'Sullivan, Peter M. Collins and Steve Young on brief) for Appellants, and

Order Denying Rehearing in banc With Dissenting Opinion

Walter H. Fleischer, Attorney, Department of Justice, William D. Ruckelshaus, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, Wade H. Ballard, United States Attorney, L. Alvin Hunt, Stanley E. Preiser and Preiser, Greene, Hunt & Wilson on brief) for Appellees.

Order Denying Motion for Reconsideration

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 14,033

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Plaintiffs-Appellants,

versus

WILLIAM S. RITCHIE, Commissioner, State Road Commission of the State of West Virginia, *et al.*,

Defendants-Appellees.

ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of the motion filed by the plaintiffs-appellants, Triangle Improvement Council, et al., for reconsideration of the opinion of this court announced on May 14, 1970, affirming the decision of the District Court, it is

ORDERED that the said motion be, and it is hereby, denied.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ J. BRAXTON CRAVEN
United States Circuit Judge

/s/ WOODROW W. JONES
United States Circuit [*sic*] *Judge*

FILED
JUL 14 1970

SAMUEL W. PHILLIPS
Clerk

Judge Sobeloff would grant the petition for rehearing, along with Judge Winter.

SOBELOFF, Circuit Judge, dissenting from the denial of a rehearing en banc: WINTER, Circuit Judge, joins in this opinion.

In light of the cryptic treatment given this appeal by the panel which decided it, I feel constrained briefly to set forth the issue, the panel's rationale, and the reasons for my disagreement.

The appellants are residents of Charleston, West Virginia's black ghetto, known as the Triangle, who will shortly be uprooted from their homes to make way for the construction of an interstate highway. They have now abandoned their futile efforts to halt or divert the road. Their sole objective at this point is to assure that when displaced they will be able to obtain adequate replacement housing, as guaranteed by federal law.

The plaintiffs' concern arises from a critical housing situation in Charleston. According to one study they cite, standard housing is only sparsely available for poor people generally, and hardly at all for poor blacks.[1] The problem of an ever shrinking housing supply has been grossly aggravated by a series of public projects, including highway construction, which have extensively eliminated housing facilities and continue to do so.

Despite informal promises made to them by state and federal officials that adequate housing will be available, the appellants are seriously apprehensive that when the time comes for them to move there will be nowhere to go

[1] Additionally, three memoranda of the federal right-of-way officer support this contention.

except to substandard, inferior quarters. It is for this reason that they demand that the state authorities comply fully with the federal requirement to submit a detailed, comprehensive relocation plan. Such a study, they say, will demonstrate that contrary to the representations of defendants, there are gross deficiencies in the housing potentially available to displacees. If the survey does support their claims there will be time before displacement to take steps, in conformity with federal law, to alleviate the problem.

The defendants assert that adequate replacement housing will exist, yet they reject the necessity for an analysis that would definitely test, either to contradict or corroborate, their assertion.[2] The sole issue on this appeal is whether

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[2] In response to this litigation the state authorities prepared a purported "relocation plan." This has not been reviewed by federal officials and there is no contention that it meets the federal standards for a sufficient plan. According to the appellants much of the proposed replacement housing referred to in the plan is either far above the financial eligibility of the displacees, not available to black people, or already occupied. Furthermore, the plan, it is said, gives no consideration to the competing demands of displacees from outside the Triangle area. Whether or not appellants' allegations are true, it is clear that any lacunae that exist in this "plan" would be filled by the federally mandated one. See note 3, *infra*.

Instead of furnishing a comprehensive plan, the defendants now rely on the District Judge's finding that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor." The plaintiffs dispute the finding and, moreover, point out that it is not up to us, nor was it for the District Court, to weigh the validity of the state's relocation program. Under the 1968 amendments, which the plaintiffs insist are applicable, there is a precise, effective administrative procedure for evaluation of the adequacy of proposed replacement housing.

If the 1968 amendments are indeed applicable, this case would seem, in light of the defendants' conduct during this lawsuit, note 6, infra, to be a particularly appropriate one in which to insist upon strict compliance with the letter of the law.

federal law requires submission of a detailed relocation plan as insisted by appellants.

In 1968 Congress recognized the predicament of poor persons whose homes are destroyed to make way for a highway, with no provision of alternative accommodations. Thus the Congress passed extensive amendments to the Federal-Aid Highway Act to provide for the "prompt and equitable relocation and reestablishment of persons" displaced by federal highway programs. 23 U.S.C. § 501. Theretofore no duty was owed to displaced persons save to furnish them information. 23 U.S.C. § 133. The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal. Under the new provisions, enacted to alleviate the inequity the Secretary may not approve a highway project unless he receives "satisfactory assurances" that, inter alia, prior to displacement, there will be available in adequate number and within the financial means of displaced persons "decent, safe and sanitary dwellings." 23 U.S.C. § 502.

What constitutes "satisfactory assurances" has been defined by regulation. They may not be merely vague or general promises. Instead, the statute and the regulations adopted pursuant thereto make mandatory a plan of relocation which describes the methods and procedures to be used and specifies detailed data concerning the replacement housing to be provided. There must also be a report probing relocation problems, analyzing other public programs affecting the availability of housing, furnishing information on concurrent displacement caused by other agencies, estimating the time required to accomplish the plan, and demonstrating that the plan is adequate "to carry out a timely, orderly and humane relocation program." IM-80-1-

68-(7) (b).[2] It is this accumulation of proposal and fact that enables federal officials to review the plan to determine whether

> [t]he State's relocation plan is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing with minimum hardship on those affected. IM-80-1-68-(5) (a).

Approval by the Secretary is necessary at two junctures of a project; first before right-of-way acquisition and then again before actual construction. 23 U.S.C. § 106; *Policy and Procedure Memorandum* 21-5. Rights-of-way for the projects involved in this case were authorized in 1966 and 1967. However, there has yet to be final approval of the construction phase. Thus it would seem that the above described requirement of a thorough plan must be fulfilled before construction in the Triange may proceed.

---

[3] IM-80-1-68-(7)(b) provides:

> The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:
>
> (1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.
>
> (2) The method and procedure by which the State will assure an inventory of currently available comparable housing which is decent, safe, and sanitary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13i), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

The defendants, however, argued that the 1968 amendments do not apply to any project in which any approval of the Secretary (either for acquisition or for construction) was obtained prior to 1968. Thus, since acquisition authorizations were obtained in 1966 and 1967, the argument ran, the new relocation provisions are inapplicable here. Defendants based their interpretation on a Department of Transportation regulation providing that

> assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. [September 1968]. IM-80-1-68-(5) (b).

The plaintiffs objected that this reading of the statute, resulting in the disregard of the 1968 relocation amendments in respect to 1970 displacements, is inconsistent with the plain statutory language, the legislative history, as well as other Department of Transportation regulations.

The District Judge accepted the defendants' view. In doing so he relied on *Udall* v. *Tallman*, 380 U.S. 1 (1965), which held that courts should show "great deference to the interpretation given the statute by the officers or agency charged with its administration" and should sustain those interpretations unless unreasonable. Accordingly, he found that "the agency's determination had a rational basis and should not be disturbed." This holding a panel of this court embraced in its one-sentence affirmance "on the opinion of the District Court."

However, subsequent to the opinion of the District Court the federal authorities issued new guidelines. These declarations, a policy directive of the Secretary of Transpor-

tation[4] and an implementing memorandum of the Federal Highway Administration,[5] reveal that federal regulations no longer subscribe to the view of limited applicability of the 1968 amendments. Rather, the new policy makes clear that, as interpreted by the Department of Transportation, the amendments pertain to all approvals of construction, even when projects have been previously authorized. Accordingy, since an appellate court "must apply the law in effect at the time it renders its decision," *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969),[6] then precisely for the reasons the District Court (and then the panel) accepted the now-discarded interpretation, this court is obliged to adopt the more, recent view.

It remains to inquire why this court has not acted on these developments. The initial panel opinion, adopting the reasoning of the District Court, logically cannot serve to answer this question because the new administrative regulations came after the opinion below. The opinionless order denying a rehearing provides no further elucidation. It is therefore necessary to set out the panel's view as I infer it to be. There is, of course, no dispute within the court that the appellants' position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved. Rather, my brethren seem to think that the new regulation, expressly recognizing the

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[4] Memorandum of Secretary of Department of Transportation: Implementation of Replacement Housing Policy, January 15, 1970.

[5] Federal Highway Administration Circular Memorandum: Relocation Assistance—Availability of Replacement Housing, March 27, 1970.

[6] It was on this theory that a separate panel of this court, consisting of Judges Haynesworth, Boreman and Sobeloff, ordered the federal defendants, who had resisted, to produce the Memorandum of the Secretary.

plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief. Their position apparently is that there is no reason to suppose that the new policy will not be applied to the Triangle and, accordingly, appellants' claim is thus mooted, at least for the time being.

I cannot subscribe to this expectation. The question is anything but moot. The defendants have consistently taken the position, both before and during the litigation, that the state authorities need not submit and the federal officials need not review a formal relocation plan. They have continued to press this contention on appeal in spite of the policy change of which they were aware. Moreover, they have been less than forthright in the course of this litigation. They resisted, without justification, producing the very memorandum of the Secretary that announced the new position and did not supply it until ordered to do so by the court. Under these circumstances I cannot think that court-ordered relief would be superfluous. On the contrary, the defendants' refusal to accord the plaintiffs' their rights cries out for redress.

Nor do I perceive any justification for the cavalier treatment accorded the appeal and the petition for rehearing. Even if injunctive relief is not appropriate this court should not, by its silence, permit any possible implication that the obligations on the defendants have not been altered since the District Court's order. As I understand it, the affirmance is based on confidence that the defendants will perform their duty, not that they have none to fulfill. When the court acknowledges the duty but without explanation does nothing to enforce it, the decision will be read by some as a holding that there is no duty. At the very least the court should have explicated its rationale to underscore the obligation and prevent misreading. Its failure to do so constitutes serious error.

APPENDIX B

Statutes & Regulations

1968 HIGHWAY RELOCATION AMENDMENTS (23 U.S.C. §501 *et seq.*)

§ 501. Declaration of policy

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 830.

§ 502. Assurances of adequate relocation assistance program

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any persons, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 831.

§ 504. Federal reimbursement

. . .

(b) Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 831.

§ 508. Relocation services

(a) Each State shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order—

(1) to determine the needs, if any, of displaced families, individuals, business concerns, and farm operators for relocation assistance;

(2) to assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, housing meeting the standards established by the Secretary for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

(3) to assist owners of displaced businesses and displaced farm operators in obtaining and becoming established in suitable locations; and

(4) to supply information concerning the Federal Housing Administration home acquisition program under section 221(d) (2) of the National Housing Act, the small business disaster loan program under section 7(b) (3) of the Small Business Act, and other State or Federal programs offering assistance to displaced persons.

(b) Nothing in this chapter shall be construed to prohibit any person from exercising any right or remedy available to him under State law with respect to any action of a State agency in carrying out this chapter.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 833.

§ 510. Authority of the Secretary

(a) To carry into effect the provisions of this chapter, the Secretary is authorized to make such rules and regulations as he may determine to be necessary to assure—

(1) that the payments authorized by this chapter shall be fair and reasonable and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the State agency making such determination.

(b) The Secretary may make such other rules and regulations consistent with the provisions of this chapter as he deems necessary or appropriate to carry out this chapter.

Added Pub.L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 834.

§ 511. Definitions

As used in this chapter—

. . .

(3) The term "displaced person" means any person who moves from real property on or after the effective date of this chapter as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway of other real property on which such person conducts a business or farm operation.

Statutes

Fair Housing Act of 1968
(42 U.S.C. §3601 et seq.)

§3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Publ. L. 90-284, Title VIII, §801, Apr. 11, 1968, 82 Stat. 81.

§3608. Administration-Authority and responsibility

(a) . . . . . .

(b) . . . . . .

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

Regulations

U.S. DEPARTMENT OF TRANSPORTATION.
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

September 5, 1968

INSTRUCTIONAL MEMORANDUM 80-1-68
34-10

SUBJECT: Relocation Assistance and Payments—Interim Operating Procedures (RCS 34-01-03)
(B/B 04-R-2211)

There are enclosed Interim Operating Procedures covering the administration of the Highway Relocation Assistance Program established by Chapter 5 of Title 23, U.S.C.

These procedures supersede paragraph 3 of PPM 80-5 and will be incorporated in a new Policy and Procedure Memorandum after a period of operation thereunder.

/s/ F. C. TURNER
F. C. Turner
Director of Public Roads

/s/ LOWELL K. BRIDWELL
Lowell K. Bridwell
Federal Highway Administrator

[Including Amendments of Paragraphs 5a(2), 5a(5) and 7b(2) dated November 15, 1968]

Regulations

Interim Operating Procedures
Relocation Assistance and Payments

1. PURPOSE

In accordance with Chapter 5 of Title 23, U.S.C., this memorandum prescribes policies and procedures relating to the following:

a. Administration of the relocation program and the provision of relocation payments and services to individuals, families, businesses, and farm operators displaced by Federal-aid highway construction;

b. Eligibility for reimbursement of relocation payments and costs of services by State and State designated agencies; and

c. Relocation payment records and relocation advisory assistance reports.

2. EFFECTIVE DATE AND APPLICABILITY

a. The provisions of this memorandum are effective August 23, 1968, and the payments and services described herein shall be provided by the State to the extent that such State is able to comply herewith under its laws. After July 1, 1970, such payments and services shall be provided by all States.

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights-of-way which are occupied by an individual, family, business, farm operator, or nonprofit organization.

Regulations

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

(3) Rights-of-way acquired without Federal participation upon which the State intends to construct a Federal-aid project from which as of August 23, 1968, individuals, families, business, farm operations, and nonprofit organizations have not been displaced.

3. AUTHORITY

Statutory authority for this memorandum is set forth in Chapter 5 of Title 23, U.S.C. (23 U.S.C. 501 *et seq.*)

4. PROGRAMMING

. . .

b. Any project agreement with a State which was executed on or before August 23, 1968, and which requires the use of property not acquired as of that date shall be amended to include the cost of providing the payments and services described in this memorandum. Any number of projects may be amended in a single action with each project identified. Form PR-37, Project Status Record, must be prepared for each project as required by Volume 22, Chapter V, Administrative Manual. Attach a copy of the modified agreement to each PR-37.

5. ASSURANCES OF ADEQUATE RELOCATION ASSISTANCE PROGRAM

a. No State highway department shall be authorized to proceed with any phase of any project which will cause

the displacement of any person or any construction project concerning any right-of-way acquired by the State without Federal participation and coming within the provisions of paragraph 2b(3) above, until it has furnished satisfactory assurances to the extent State law permits, that:

(1) Relocation payments and services were or will be provided as set forth in paragraphs 6-10 of this memorandum.

(2) In the event housing available to persons without regard to race, color, religion or national origin will not be available within a reasonable period of time prior to displacement as provided in paragraph 7 of this memorandum, the State shall provide a detailed statement specifying the respects in which such assurance cannot be furnished, the extent to which such housing will be available prior to displacement, the period of time prior to displacement when that housing will become available and an estimate of the additional time within which such housing will become available to the extent that it can be reasonably accomplished.

(3) The public was or will be adequately informed of the relocation payments and services which will be available, as set forth in paragraph 12 of this memorandum.

(4) No person lawfully occupying the real property shall be required to move from his home, farm or business location without at least 90 days written notice of the intended vacation date from the State or political subdivision having responsibility for such acquisition. This provision must be carried out to the maximum extent practicable and exceptions should be made only in the case of very unusual conditions. Such assurance can be furnished on a State-

wide basis or set forth in Point 31 of the State's statement of organization and procedures.

(5) The State's relocation program is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing available to persons without regard to race, color, religion or national origin with minimum hardship on those affected.

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The State will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum.

c. The State's assurances shall be accompanied by a statement in which it specifies the provisions of this memorandum with which it is unable under its laws to comply in whole or in part. In the event a State maintains that it is legally unable to comply fully with one or more of the provisions of this memorandum, its statement shall be supported by an opinion of the chief legal officer of the highway department in which he discusses the legal issues raised and cites reasons and authorities in support of his conclusion for each representation of legal inability to comply.

7. Development of Relocation Program Plan.

The planning for the relocation program shall be accomplished in stages:

a. Conceptual Stage. A project will be considered to be in this stage until such time as the final location is ap-

proved. At this stage the tenant is not to be disturbed in any way. The cost incurred in connection with securing this information is chargeable to preliminary engineering. Prior to the completion of this stage and prior to the public hearing, the State shall make preliminary investigations which will furnish the following information for each of the various alternative locations given final consideration.

(1) Approximate number of individuals, families, businesses, farms, and nonprofit organizations that would be displaced.

(2) The probable availability of decent, safe, and sanitary replacement housing within the financial means of those displaced.

(3) The basis upon which the above findings were made and a statement relative thereto by the State to the Bureau of Public Roads.

b. Right-of-Way Acquisition and/or Construction Stage.

The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:

(1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.

(2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons without regard to race, color, religion or national origin which is decent, safe, and sani-

tary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13a), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

(3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:

(a) outline the various relocation problems disclosed by the above survey;

(b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;

(c) provide detailed information on concurrent displacement and relocation by other governmental agencies or private concerns;

(d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees.

(e) estimate the amount of leadtime required and demonstrate its adequacy to carry out a timely, orderly and humane relocation program;

(f) assure no person lawfully occupying real property shall be required to move without at least 90 days written notice; and

(g) furnish the names of the agency or agencies, if other than the State, which will provide the relocation assistance including an analysis of their present workload

and ability to perform and the estimated number and job titles of relocation personnel servicing the project.

13. STANDARDS FOR DECENT, SAFE, AND SANITARY HOUSING

a. A decent, safe, and sanitary dwelling is one which meets all of the following minimum requirements:

(1) Conforms with all applicable provisions for existing structures that have been established under State or local building, plumbing, electrical, housing and occupancy codes and similar ordinances or regulations applicable to the property in question.

(2) Has a continuing and adequate supply of potable safe water.

(3) Has a kitchen or an area set aside for kitchen use which contains a sink in good working condition and connected to hot and cold water, and a sewage disposal system. A stove and refigerator in good operating condition shall be provided when required by local codes, ordinances or custom. When these facilities are not so required by local codes, ordinances, or custom the kitchen area or area set aside for such use shall have utility service connections and adequate space for the installation of such facilities.

(4) Has an adequate heating system in good working order which will maintain a minimum temperature of 70 degrees in the living area under local outdoor design temperature conditions. A heating system will not be required in those geographical areas where such is not normally included in new housing.

(5) Has a bathroom, well lighted and ventilated and affording privacy to a person within it, containing a lava-

tory basin and a bathtub or stall shower, properly connected to an adequate supply of hot and cold running water, and a flush water closet, all in good working order and properly connected to a sewage disposal system.

(6) Has provision for artificial lighting for each room.

(7) Is structrally sound, in good repair and adequately maintained.

(8) Each building used for dwelling purposes shall have two safe unobstructed means of egress leading to safe open space at ground level. Each dwelling unit in a multi-dwelling building must have access either directly or through a common corridor to two means of egress to open space at ground level. In buildings of three stories or more, the common corridor on each story must have at least two means of egress.

(9) Has 150 square feet of habitable floor space for the first occupant in a standard living unit and at least 100 square feet of habitable floor space for each additional occupant. The floor space is to be subdivided into sufficient rooms to be adequate for the family. All rooms must be adequately ventilated. Habitable floor space is defined as that space used for sleeping, living, cooking or dining purposes, and excludes such enclosed places as closets, pantries, bath or toilet rooms, service rooms, connecting corridors, laundries, and unfinished attics, foyers, storage spaces, cellars, utility rooms and similar spaces.

b. Rental of sleeping rooms. The standards for decent, safe, and sanitary housing as applied to the rental of sleeping rooms shall include the minimum requirements contained in subparagraphs a(1), (4), (6), (7) and (8) of this paragraph and the following:

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(1) At least 100 square feet of habitable floor space for the first occupant and 50 square feet of habitable floor space for each additional occupant.

(2) Lavatory and toilet facilities that provide privacy including a door that can be locked if such facilities are separate from the room.

c. In lieu of the standards listed in this paragraph the agency providing the relocation assistance described in the PPM may submit for approval by the Director of Public Roads a local housing code by means of which the decent, safe, and sanitary nature of replacement housing for a project is to be judged. Any code so submitted shall be reasonably comparable to the list of standards incorporated in this paragraph.

d. The Director of Public Roads may approve exceptions to the standards in this paragraph where unusual conditions exist.

Regulations

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D. C. 20591

February 12, 1969

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM: J. A. Swanson, Director of Right-of-Way and 34-10 Location Washington, D. C. s/ John A. Swanson

SUBJECT: Relocation Procedures—Going Projects

Paragraphs 2 (b) (2) and (3) of IM 80-1-68 state that its provisions are applicable to all active Federal-aid projects and to all other active projects upon which the State later intends to construct a Federal-aid project where there remain individuals families, businesses, farm operations, and non-profit organizations which will be displaced.

In accomplishing the planning for the relocation program required under paragraph 7, the State should undertake such planning on all active projects to the extent that it is reasonable and proper. Each such project undoubtedly will involve a different set of circumstances and conditions. It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any additional authorizations to acequire right-of-way or to authorize construction on a project for which right of way was acquired after August 23, 1968, irrespective of the source of funds utilized for such acquisition, to assure himself that the State has or will make the necessary re-

locations without undue hardship to the relocatees. If a major portion of the relocations have previously been accomplished very little good would result from going through the conceptual stage study. However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b. Some variation may be permitted by the division engineer when the circumstances warrant.

It should always be borne in mind that regardless of the information furnished at this stage of the project it is the responsibility of the State to furnish relocation assistance, and payments where authorized by State law, in accordance with the requirements of the law and the Im. At no time should a relocatee be forced into housing less desirable than that from which he was required to move and to the extent possible under State law all relocations should be made to decent, safe and sanitary dwellings.

Regulations

MEMORANDUM

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

Date: January 15, 1970

SUBJECT: Implementation of Replacement Housing Policy

FROM : The Secretary

TO : Commandant, United States Coast Guard
Federal Aviation Administrator
Federal Highway Administrator
Federal Railroad Administrator
Urban Mass Transportation Administrator

I have reviewed the procedures for implementation of the DOT replacement housing policy as submitted in response to my October 20, 1969, memorandum.

I find that some of the submissions should be improved to clearly emphasize and cover certain aspects of this new policy. Ordinarily I would request that the necessary changes be made and the procedures resubmitted to me for final approval. However, I consider this new policy so important that I am approving the procedures at this time so that you can make the necessary changes and place them into effect without delay. For your assistance in this regard, attached are copies of all of the proposed procedures submitted. The procedures for the Federal Railroad Administration are still being developed and will be provided other addressees by the Federal Railroad Administrator directly.

Regulations

Each of you should reexamine your proposed procedures and make any modifications or changes necessary to make certain that they emphasize and provide full and specific coverage of the following points:

1. Specific written assurances that adequate replacement housing will be available or provided for (built, if necessary) will be required before the *initial* approval or endorsement of any project.

2. Construction will be authorized only upon verification that replacement housing is in place and has been made available to all affected persons.

3. All replacement housing must be fair housing—open to all persons regardless of race, color, religion, sex or national origin. This is in addition to the requirement that replacement housing must be offered all affected persons regardless of their race, color, religion, sex or national origin. Coverage of these two points is consistent with the requirements of Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964,

Copies of your final procedures to implement this policy should be submitted to the Departmental Director of Civil Rights as soon as possible.

/s/ JOHN VOLPE

Attachments

Regulations

[EMBLEM]

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

April 10, 1970

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM : John A. Swanson, Associate Director
34–10 for Right-of-Way and Location
Washington, D.C.

SUBJECT: Relocation Assistance—Availability of Replacement Housing (Supersedes White Circular Memorandum dated March 27, 1970)

This memorandum is applicable to the following:

a. All Federal-aid or any other highway projects financed in whole or in part with Federal-aid highway funds or other Federal funds authorized on or after May 1, 1970, involving rights-of-way which are occupied by an individual or family.

b. All Federal-aid or any other highway project financed in whole or in part with Federal-aid highway funds or other Federal funds authorized prior to May 1, 1970, on which individuals or families are still to be displaced as of May 1, 1970.

Regulations

The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

Such replacement housing shall be:

a. Fair housing—open to all persons regardless of race, color, religion, sex, or national origin.

b. In areas not generally less desirable in regard to:

   1. Public utilities

   2. Public and commercial facilities

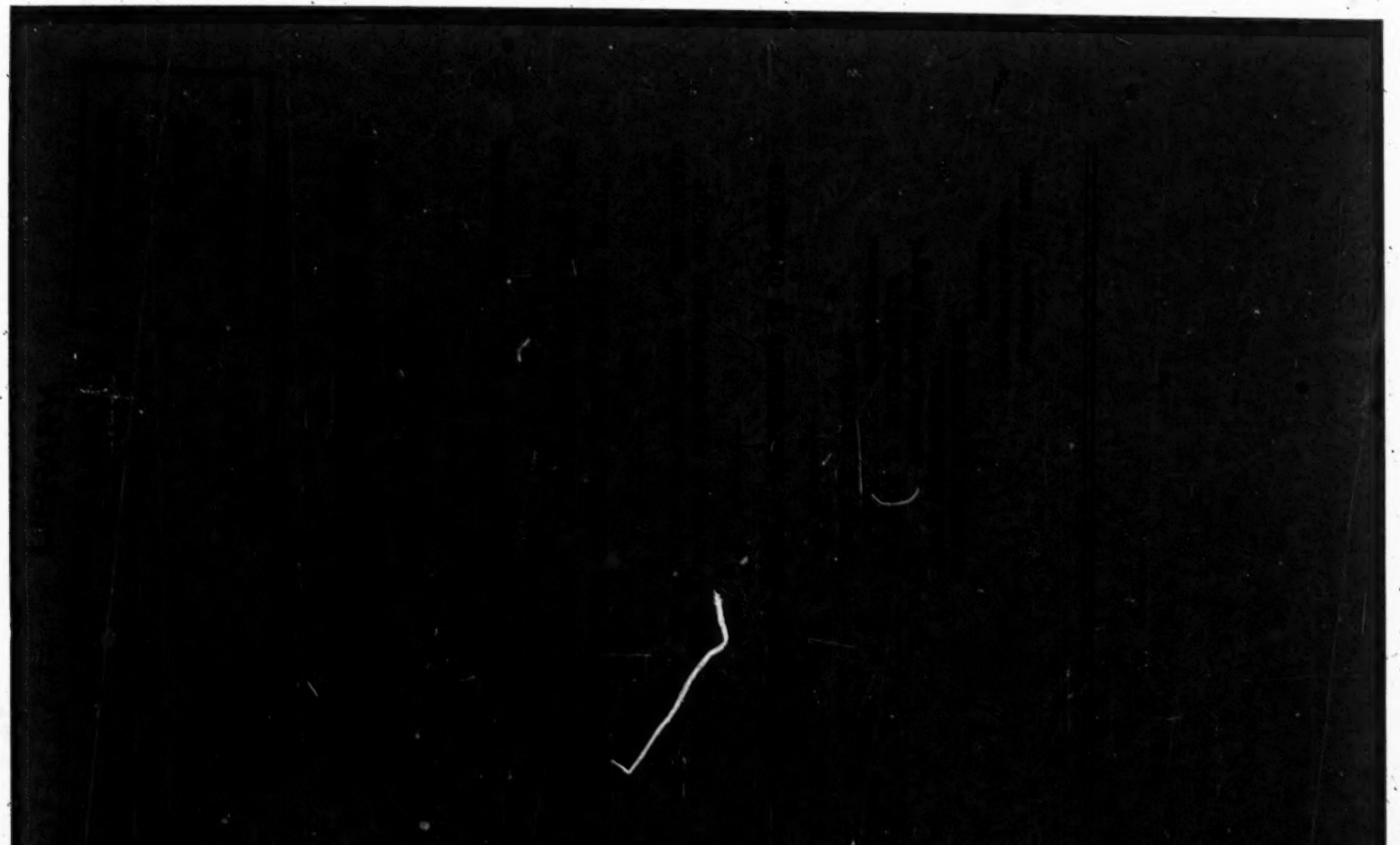
c. Available at rents or prices within the financial means of the families and individuals displaced.

d. Decent, safe and sanitary.

e. Reasonably accessible to the displacees' places of employment.

f. Adequate to accommodate the displacee.

The applicable PPM's and IM's are being revised to conform to the above policy.



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Statutes:

Federal-Aid Highway Act, 23 U.S.C. 501, *et seq*:

23 U.S.C. 502 — 3

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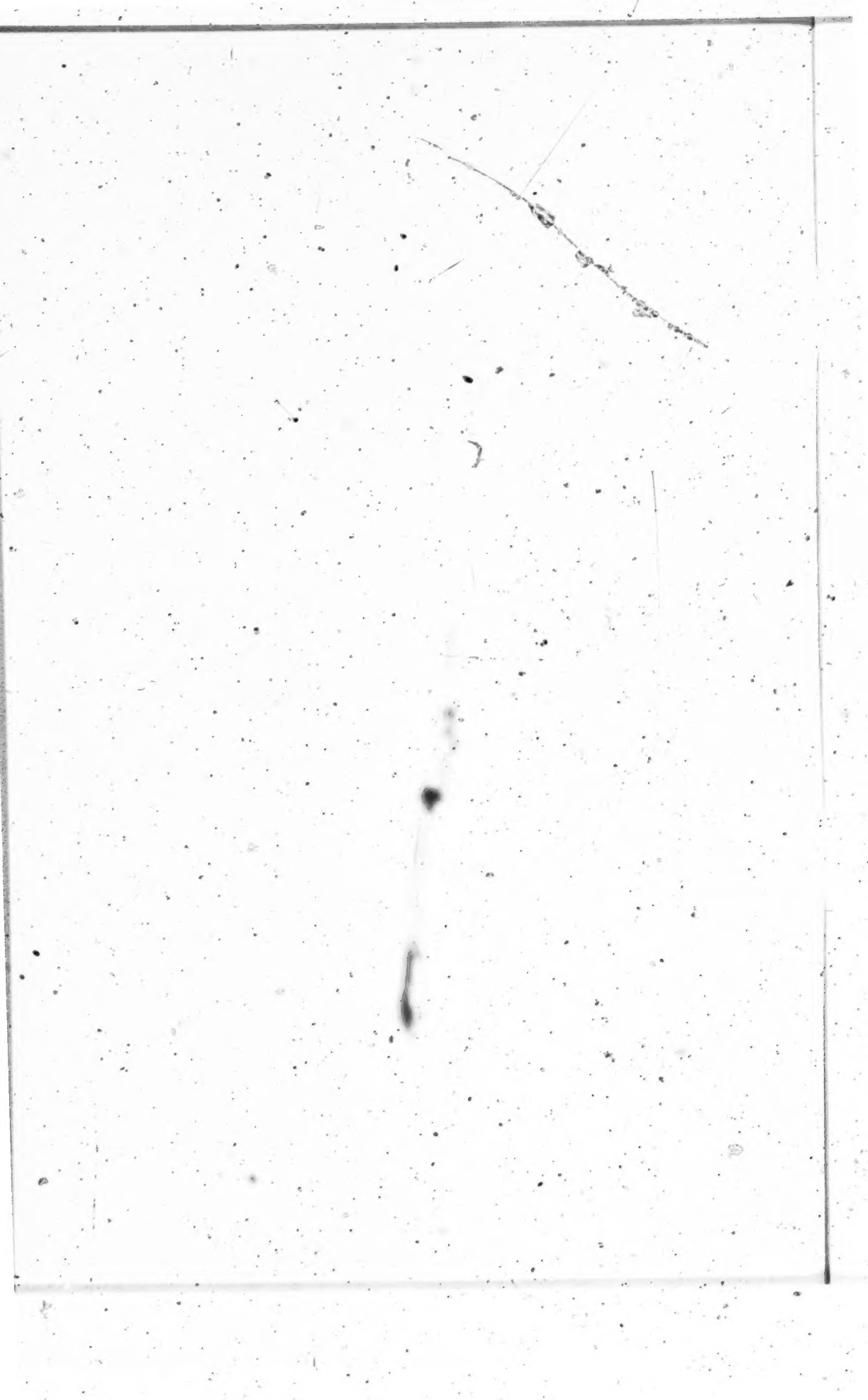

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, ET AL., PETITIONERS

v.

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. 1a–25a) and the court of appeals (Pet. App. 30a–31a) are not yet reported. The order of the court of appeals denying a motion for rehearing en banc (Pet. App. 33a–35a) and the opinion dissenting from that denial (36a–42a) is reported at 314 F. Supp. 20.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1970 (Pet. App. 32a). A petition for rehearing was denied on July 14, 1970 (Pet. App. 33a). The

petition for a writ of certiorari was filed on September 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Department of Transportation correctly construed its own regulation as not requiring that a formal relocation plan be submitted and approved for federally-aided highway projects on which rights-of-way had been acquired and persons dislocated prior to the passage on August 23, 1968, of new relocation amendments to the Federal-Aid Highway Act.

2. Whether the finding of the district court (Pet. App. 23a) that "[t]he evidence indicates that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor," is clearly erroneous.

STATEMENT

This action seeks injunctive and declaratory relief to prevent the construction of a section of Interstate Highways I–64 and I–77 through the so-called Triangle area in Charleston, West Virginia, inhabited primarily by low income Negroes. Petitioners allege that respondents[1] failed to comply with the statutory and regulatory requirements for relocation for residents to be displaced by the highway.

After a full trial, the district court rendered a lengthy opinion (Pet. App. 1a–25a) holding that (1)

[1] Respondents include officials of the State of West Virginia, the Secretary of Transportation and two subordinate officials of the Department of Transportation.

the respondents had not failed to comply with any provisions of the Federal-Aid Highway Act dealing with relocation of persons displaced by federally-aided highways, or any provisions of the Department of Transportation's Instructional Memorandum implementing those statutory provisions, which were applicable to the projects in question; (2) adequate relocation housing is expected to be available to accommodate all persons remaining in the area; and (3) petitioners had not been denied equal protection of the laws.[2] The court of appeals affirmed on the opinion of the district court (Pet. App. 30a).

Prior to August 23, 1968, federal statutes required only that States give satisfactory assurances to the Secretary of Transportation that relocation advisory assistance would be provided to persons displaced by interstate highways. (Vol. II, pp. 83–84).[3] On August 23, 1968, Congress enacted new relocation amendments to the Federal-Aid Highway Act, 23 U.S.C. 501, *et seq.* These amendments (23 U.S.C. 502) prohibited the Secretary from approving projects which cause displacement of persons unless he has received satisfactory assurances from the State Highway Department that within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, at

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[2] The district court held that insofar as the suit sought to attack the basic decision to route the highway through that area, made final in August 1964, it was barred by laches (Pet. App. 10a–11a), and subsequently that issue has been abandoned by petitioners.

[3] References to Vol. I and Vol. II are to the record in the court of appeals.

rents or prices within the financial means of the individuals displaced, decent, safe, and sanitary dwellings equal to the number of dwellings needed by such displaced persons.[4]

At the time the amendments were enacted, the projects of which Triangle is one part were already well under way. Many people had already been displaced from the areas (although the number of persons displaced in Triangle was small), and the Secretary had authorized all acquisitions of rights-of-way between April 19, 1966, and May 23, 1967 (Pet. App. 9a, 11a–12a). Petitioners basically contend that, even though the projects were well under way when the amendments were passed, respondents are required to suspend the projects until a formal relocation plan has been drawn up, and it has been determined from such a plan that adequate relocation housing will be available.

Petitioners relied in the district court on provisions of an Instructional Memorandum of the Department of Transportation regarding the relocation of persons displaced by federal-aid highways (Pet. App. 52a–55a). The district court, however, agreed with the respondents' construction of the memorandum as not requiring the formulation of such a formal plan for projects, such as the ones including Triangle, on which substantial displacements had occurred before August 23, 1968 (Pet. App. 18a–19a). The district court cited

[4] The amendments also provided for greatly increased payments to displaced persons, such as rent supplements of up to $1500 to displaced tenants, and the rendering of relocation assistance to those to be displaced (23 U.S.C. 505–508).

provisions of the memorandum stating that it applies only to projects authorized on or before August 23, 1968, "on which individuals * * * have not been displaced" and that "The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum" (Pars. 2b and 5b, Pet. App. 49a–50a, 52a).

The district court further rejected petitioners' contention that they were being denied equal protection of the laws as the result of their prospective relocation. At the trial, evidence had been presented regarding both past and present practices of the state and federal agencies concerning relocations and the prospects for relocating in adequate housing the individuals then remaining in the Triangle area. There was testimony that the relocation office run by the State makes a survey of individuals to be displaced, to determine whether they want to relocate, what their incomes and family situations are, where they work and go to church, etc.; and that it keeps a continual survey of housing available for sale or rent, on a day-to-day basis. On the two projects which include Triangle, nine or ten people are assigned full time duty inspecting housing available to dislocatees and rendering personal assistance to such persons, such as taking them in cars to show them property, helping them move into housing and providing payments required by the Act to be made to persons dislocated. (Vol. II, pp. 337–338.)

In addition, it appeared that public housing alone in Charleston was expected to have a turnover sufficient

to supply replacement housing to all Triangle displacees (Vol. II, p. 173). A large daily listing of private housing is maintained by the relocation office, and despite a substantial number of displacements in Charleston in the past two years, the number of available dwelling units had not decreased (Vol. II, pp. 325–326). Between January 1967, and March 1969, the State Relocation Office had relocated about 2000 persons (Vol. II, pp. 369–384). On the basis of this experience with 2000 relocations, the Director of the Right-Of-Way Division of the State Road Commission testified that he believed that the remaining Triangle residents (then about 284) could be relocated in adequate housing, and that successful relocation would not be hindered by racial discrimination. (Vol. II, p. 369).

The United States Federal Highway Administration also has carefully scrutinized relocations in this area. It has reviewed 512 relocation cases and highway projects in West Virginia, including about 125 relocations on the two projects here involved (Vol. II, p. 117). It audited the State's progress with regard to relocations on a day-to-day basis (Vol. II, pp. 118–119) and ascertained that the State Highway officials were operating a well-staffed, vigorous and convenient relocation office in the area, which was actively assisting residents (Vol. II, pp. 123–124). Mr. Gerald Saunders, the Division Right-of-Way Officer for the Bureau of Public Roads, stated (Vol. II, p. 75):

> They have to my satisfaction, based on the two years experience that I have had in this office closely watching their whole right-of-way oper-

ation, satisfied me that they can relocate the people in the Triangle area and other areas. Although petitioners relied on memoranda written in early 1968 suggesting an impending shortage of relocation housing in Charleston (Vol. I, pp. 61–70), Mr. P. E. Carpenter, the Division Engineer for the West Virginia Division of the Bureau of Public Roads (Vol. II, p. 398), testified that since then, the relocation situation had improved. He pointed particularly to the availability of rental supplements under the 1968 amendments, and also to the fact that anticipated urban renewal programs had been delayed (Vol. II, p. 414). In addition, witnesses for the state testified that the relocation program of Triangle residents had deliberately been paced "over the period of time it takes to see that every one of them is offered safe and sanitary and decent housing so that no one is forced to move until they have these accommodations available" (Vol. II, pp. 389–390).

Subsequent to the district court's decision, while the case was pending in the court of appeals, the Department of Transportation issued a memorandum dated April 10, 1970, which stated (Pet. App. 62a–63a):

> The division engineers should not authorize any phase of construction * * * which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the state offers

him adequate replacement housing which is available for immediate occupancy.

ARGUMENT

1. The constitutional issue petitioners raise is dependent on their assertion that adequate relocation housing will not in fact be available. The district court explicitly ruled to the contrary (see Pet. App. 22a–25a), finding (Pet. App. 23a):

> The evidence indicates that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor. * * *

The court of appeals necessarily approved that finding when it affirmed on the opinion of the district court.

All the factual contentions which petitioners make are disputed on the record. For example, while petitioners assert without record reference (Pet. 10) that the "shortage has worsened," the evidence at trial showed that the supply of private housing available had remained constant, and that the urban renewal program which petitioners claimed would create displacements which would cause conflicting demands on existing housing had not in fact started, and was not anticipated to start during the period in which most highway displacements would take place (Vol. II, pp. 374–375). Similarly, petitioners' contention (*E.g.*, Pet. 7, 11) that the only basis for the conclusion that adequate housing is expected to be available was "vague or general promises" or "oral assurances" is

incorrect; that conclusion was based on two years' experience with a large number of relocations and close knowledge of the current state of the public and private housing market. Since 2000 persons have been successfully relocated from these projects, there is no reason to doubt the correctness of the district court's findings that the limited number of remaining residents—about 100 in the Triangle area and the same number in other areas—also can be successfully relocated.[5]

2. Petitioners' contentions regarding the necessity for submission of a formal relocation plan for these projects involve only the applicability of certain provisions of the Department of Transportation's memoranda to projects under way when the statute was passed in August, 1968. These are nonrecurring issues of diminishing importance.

The provisions of the memorandum relating to submission of formal relocation plans apply only to projects in which significant displacement of persons had not taken place prior to the 1968 statutory amendments. See Pet. 18a. Similarly, as petitioners recognize (Pet. 16), the memorandum of April 10, 1970 (Pet. App. 62a–63a) does not require the submission of such a plan. (Pet. 3). While formal plans are a useful tool

[5] Petitioners' contention that the decision below conflicts with *Arrington* v. *City of Fairfield, Alabama*, 414 F. 2d 687 (C.A. 5), rests entirely on their factual assertion that adequate housing will not be available. Even giving *Arrington* its broadest possible reading, that case could be construed to hold at most only that allegations of the kind made by petitioners state a claim on which relief can be granted, *if proven*.

in planning for future relocations for projects which are not well under way, contrary to petitioners' contention (Pet. 16) they are not "the only mechanism" which can successfully carry out relocations.

It is sufficient to provide that on projects already under way persons will not be removed until adequate housing is available. That is what the April 10 memorandum provides, and that is what the record shows that respondents have been doing. Indeed, even before the April 10 memorandum,[*] relocation of Triangle residents had taken place "over the period of time it takes to see that every one of them is offered safe and sanitary and decent housing so that no one is forced to move until they have these accommodations available" (Vol. II, pp. 389–90).

---

[*] The circular memorandum of April 10, 1970, slightly revised an earlier circular memorandum of March 27, 1970, which formally implemented a policy announcement of February 16, 1970 by Secretary of Transportation Volpe. Petitioners' implication (Pet. 6) that the government concealed that policy statement is not correct. It was the government which brought the Secretary's policy statement to the Court of Appeals' attention by printing the press release containing the statement as an appendix to its brief in the court of appeals. The government did resist giving to petitioners an internal memorandum from the Secretary to his subordinates, which the court of appeals ordered to be produced. That internal memorandum (Pet. App. 60a–61a) in no relevant way differed from the press release announcing the Secretary's policy, or from the circular memoranda formally implementing the policy (Pet. App. 62a–63a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE OF PETITIONERS TO BRIEF OF THE FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

Since the filing of the petition, the opinion of the district court (Pet. App. 1a-25a) has been reported at 314 F. Supp. 20,[1] and those of the Court of Appeals at 429 F.2d 423.

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[1] The Brief in Opposition erroneously identifies that citation containing the order and dissenting opinion of the Court of Appeals on petition for rehearing *en banc*. Respondents' Brief, p. 1 (hereinafter cited as R.B. —).

Argument

The federal respondents identify the questions presented as whether the Department of Transportation correctly construed its own *regulation* regarding the requirement of a relocation plan, and whether the district court's findings relating to the availability of relocation housing is clearly erroneous. R.B. 2. This is a substantial variance from the issue presented in the petition and throughout the litigation and as identified by the Court of Appeals. The petitioners have always asserted that the original regulations promulgated by the Department constitute an erroneous application of the underlying statute, the 1968 amendments to the Federal Aid Highway Act, 23 U.S.C. §501, et seq. The question of the construction of regulations arose only when the Department changed its regulations regarding relocation during the pendency of the appeal. (Pet. App. 60a-63a.) Recognizing this, Judges Sobeloff and Winter, dissenting from the denial of rehearing *en banc*, stated, without contradiction: "The sole issue on this appeal is whether federal law requires submission of a detailed relocation plan as insisted by appellants." (429 F.2d at 424; Pet. App. 37a-38a.) Answering this question in light of the new regulation, Judge Sobeloff, again without contradiction, states:

> There is, of course, no dispute within the court that appellants' [petitioners'] position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved. Rather, my brethren seem to think that the new regulation, expressly recognizing the plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief . . .
>
> . . . On the contrary, the defendants' refusal to award the plaintiffs their rights cries out for redress. (*Id.* at 426; Pet. App. 41a-42a.)

Once so clarified,[2] it can be seen that these are not "non-recurring issues of diminishing importance." (R.B. 9.)[3] Rather the issue is one of fundamental importance, not simply to the residents of the Triangle, but to the administration of justice. Here the Court of Appeals has interpreted the new regulations of the administrative agency as upholding petitioners' legal position—that a relocation plan is required. 429 F.2d at 426; Pet. App. 41a. Nonetheless, that court affirmed the district court's opinion which was based on a discarded regulation, and granted no relief to the petitioners. It is one thing for the courts to declare that the law is not in your favor. It is quite another for the

---

[2] Errors of the same nature are found elsewhere in Respondents' Brief. The opening statement describes this action as seeking "to prevent the construction" of the highway (R.B. 2). That claim was abandoned in the district court. Respondents assert that petitioners relied in the district court on provisions of an Instructional Memorandum of the Department of Transportation to sustain their position that a relocation plant was required. (R.B. 4.) In fact, I.M. 80-1-68, the memorandum referred to, specifically excluded projects such as the one here from its coverage (§5(b); Pet. App. 52a.) Petitioners asserted that the memorandum incorrectly interpreted the *statute*, by denying it retroactivity. The district court rejected this, relying on the principle of deference to the administrator's interpretation of the statute he is enforcing, 314 F. Supp. 29-30; Pet. App. 19a-21a. During the pendency of the appeal, the Department changed its regulations, giving the relocation requirement retroactive effect. Pet. App. 60a-63a. It was this change in the law that led the dissenting judges in the Court of Appeals to assert that the panel opinion adopting the reasoning of the district court "logically cannot serve" to dispose of the issue, under the principle of *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281. 429 F.2d at 426; Pet. App. 41a.

[3] Even if the issue *were* limited to the retroactivity of the 1968 amendments, the impact would be substantial. Of the proposed 9000 miles of the interstate highway system which was not yet constructed when the statute was enacted, much had passed the stage of "authorization to acquire" being granted. 1968 U.S. Code Cong. Adm. News 4046. If the statute does not protect the people affected by these projects, many of which are in congested urban areas, it will have little meaning.

courts to find that the law entitles you to relief, but to refuse to grant it.[4]

Finally, respondents suggested that the finding of the district court that relocation housing is available makes it unnecessary to be concerned with the question of whether the law requires a relocation plan, since in any event petitioners are being protected. This is untrue on two grounds: First, it is the Department's own regulations, based on their experience in relocation (see Pet. 17 n. 8), which define the requirement of "satisfactory assurances" in the statute as calling for comprehensive relocation planning. I-M 80-1-68 (7) (Pet. App. 52a-55a). Second, the finding of the district judge was based largely on general assurances which he took in "good faith." 314 F. Supp. 30; Pet. App. 22a. These self-serving declarations of the highway officials were contrary to documentary evidence submitted by petitioners (Plf. Exh. No. 12; Tr. 414-15), and even in the best light were based on the experience of relocating 2000 predominantly rural white persons state wide, bearing little relation to the problems of placing a large number of poor black persons in a saturated and discriminatory housing market.[5] Moreover, if it is indeed true that relocation housing is available, the preparation of a plan should be a simple matter. The concerted resistance of respondents throughout this litigation strongly suggests that the plan

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[4] It is little wonder, under these circumstances, that the residents of the Triangle took to "self help" measures to stop the bulldozers from destroying their homes. *New York Times*, July 13, 1970, p. 62, col. 1.

[5] One of the programs which, it was asserted, would ease the relocation problem, was the availability of rent supplements. (Tr. 412-15.) However, as the letter attached as Appendix A to this response indicates, rent supplements have been denied because the only replacement housing available, although more expensive, did not meet the federal standards.

would demonstrate the lack of such housing, and justify petitioners' demand for compliance with the 1968 amendments.[6]

CONCLUSION

WHEREFORE, for the foregoing reasons, and for those stated in the petition in chief, a writ of certiorari should be granted.

Respectfully submitted;

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---

[6] Two examples should make the distinction clear. The district court relied on the availability of public housing, without finding that the displacees were eligible. 314 F. Supp. at 31, Pet. App. 23a; see R.B. 5-6. The plan would require such a finding. Second, respondents point to the delay in a planned urban renewal project as easing the housing shortage (R.B. 8). At best, this would mean that the highway displacees could move, for a short time, to housing already slated for demolition for the renewal project. A comprehensive plan would consider these long range implications.

APPENDIX A

[SEAL]

WEST VIRGINIA DEPARTMENT OF HIGHWAYS
OFFICE OF THE DISTRICT ENGINEER
FIRST DISTRICT
1340 Smith Street
Charleston, West Virginia
25301

William S. Ritchie, Jr.
Commissioner

Layman Smith
District Engineer

June 12, 1970

Mrs. Dorothy Collins
709½ Bullitt Street
Charleston, West Virginia

RE: Project I-77-3 (66) 100
Parcel No. 1-1

Dear Mrs. Collins:

As a result of the inspection of your replacement property, the Department cannot approve your application for a replacement housing payment. Attached are the minimum requirements for a decent, safe and sanitary property as set forth in the Federal Highway Act of 1968. The structure you are now occupying does not meet the standards that are checked on the enclosed form.

In the event you should move to another property within one year after you moved from the above captioned parcel

and the new property meets the attached requirements or if you change your present dwelling to meet these requirements, the Department will reconsider your application.

Very truly yours,

/s/ L. C. McCann

L. C. McCann
District Right of Way Agent

LCM/A/c
Enclosure

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On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

Brief Amicus Curiae of the National Housing and Economic Development Law Project

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Brief Amicus Curiae of the National Housing and Economic Development Law Project

THE INTEREST OF AMICUS CURIAE

The National Housing and Economic Development Law Project was established in 1968 as a component of the Earl Warren Legal Institute at the University of California at Berkeley. It is funded and sponsored by the Legal Services Division of the Office of Economic Opportunity pursuant to the Economic Opportunity Act. 42 U.S.C. §§ 2711 *et seq.* The chief function of the Project is to serve as a resource for the approximately 265 Legal Services projects in the country, which are staffed by more than 1800 attor-

neys. These attorneys advise and represent approximately 500,000 low-income clients annually.

Attorneys with the National Housing and Economic Development Law Project assist these neighborhood lawyers in helping their clients in the areas of federally subsidized housing programs, private landlord-tenant relations, federal urban programs, low-income housing production, community economic development and other matters relating to housing and urban affairs. In addition to assistance in individual cases, the Project attempts to further the development of the law in the area of housing and urban affairs towards an increasing recognition of the rights and needs of low-income persons in the United States.

Since its inception the Project has assisted neighborhood lawyers in negotiations with Federal and State highway officials in connection with the planned construction of federal highways which threaten to destroy low-income communities in twelve cities in eight states. In several instances the Project has become co-counsel in relocation suits such as that here presented, where such litigation was deemed necessary by local counsel and their clients. Two of such suits, which arose in Austin, Texas[1] and Seattle, Washington,[2] and are now respectively pending appeal in the United States Courts of Appeals for the Fifth and Ninth Circuits, present factual issues which are in important respects virtually identical to those here presented. Indeed, in every dispute between an impoverished local community to which amicus is providing assistance and State and Federal highway officials, the material facts are simply a variation of those which occurred in Charleston.[3]

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1. *Concerned Citizens for the Preservation of Clarksville v. Volpe*, No. 30286 (5th Cir.) (pending decision)

2. *Lathan v. Volpe*, No. 8986 (W.D.Wash. 1970) (as yet undocketed in the United States Court of Appeals for the Ninth Circuit; Notice of Appeal filed on November 27, 1970.)

Highway projects initially underway in cities across the country, which collectively will cause the displacement of thousands of impoverished families and individuals, are in the same posture as the project involved in this appeal; that is, although displacement has still not occurred, certain preliminary authorizations were obtained from the Department of Transportation (DOT)[4] prior to enactment of the Federal-Aid Highway Act of 1968 or regulations promulgated thereunder. Whether these prospective displacees, who were intended to benefit from the 1968 legislation, will nevertheless be victimized by state highway departments, may well depend upon the outcome of this appeal.

That this appeal presents a question of substantial importance to the low-income persons served by the Project is further established by statistical evidence which indicates that in recent years the Federal-Aid Highway Program has probably destroyed more truly low-cost housing than has been built by the public housing program during a comparable period.[5] As will be shown in this brief, investigations

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3. E.g., *Northeast Welfare Rights Organization v. Volpe*, No. 3437, (E.D. Wash. 1970) (federal-aid highway project in Spokane, Washington.)

4. Although numerous functions of the DOT relative to federal-aid highways are performed by its constituent agencies, such as the Federal Highway Administration and Bureau of Public Roads, for purposes of simplification this brief will refer only to the DOT.

5. During the 18 month period from April 1, 1965 to October 1, 1966, the homes of 49,605 families and individuals were destroyed as a result of federal-aid highway construction. The majority of the housing destroyed was "midrange or lower cost housing." *Highway Relocation Assistance Study*, a study transmitted by the Secretary of the Department of Transportation to the Congress as required by the Federal-Aid Highway Act of 1966, 90th Cong., 1st Sess., Committee Print No. 9 (1967) pp. 3-6. During 1965 and 1966 the federal government commenced the construction of only 23,000 units of public housing annually, or 34,500 on an 18 month basis. National Commission on Urban Problems, *Building the American City* (1968), p. 112.

and reports by Congress and independent organizations have disclosed that, even where the applicability of relocation requirements is unquestioned, they have been largely ignored by the state and federal agencies charged with their implementation. Thus, in clear violation of Congressional mandate, public highway officials are exacerbating a national housing crisis which has severest consequences for the poor generally and the racially oppressed in particular.[6]

SUMMARY OF ARGUMENT

As the briefs of the parties fully set forth the facts and proceedings below, amicus will not repeat them here. Briefly stated, and only insofar as the merits are concerned, the United States District Court for the Southern District of West Virginia, in a decision[7] which was affirmed without opinion by the United States Court of Appeals for the Fourth Circuit,[8] dismissed the complaint on two grounds: first, that the statutes and implementing regulations enacted and promulgated in 1968 were inapplicable since DOT approval of acquisition of the right-of-way for the I-77 project was granted prior to 1968; and, second, that in

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6. As stated in *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920, (2d Cir. 1968):

> The specific problem is not that non-white displacees are, on the average, poorer than white displacees. That may be so, but it is a more general problem. What we are concerned with is that discrimination which forecloses much of the housing market to some racial groups, thereby driving up the price they must pay for housing. The situation is made worse by the fact that most people displaced by urban renewal are non white. 395 F. 2d at 931.

7. 314 F.Supp 20 (S.D.W.Va., 1969)

8. 429 F.2d 423 (4th Cir. May 14, 1970). Rehearing en banc was denied on July 14, 1970. Judge Sobeloff, joined by Judge Winter, filed a dissenting opinion. *Id.*

any event, adequate replacement housing, on an open racial basis, will be available in Charleston for the orderly relocation of persons displaced by the highway project.

Amicus will not reiterate the forceful arguments presented in petitioners' brief and in the dissenting opinion of Judge Sobeloff; rather it will primarily confine itself to a demonstration that in view of the history of the federal-aid highway program and the legislative activities which culminated in the Federal-Aid Highway Act of 1968, Congress did not intend to suspend application of that Act to projects like I-77. As will be shown, non-application of this Act in the present case would have negative effects nationally which should not be allowed to occur in the absence of explicit Congressional mandate. Amicus will also show that the considerations which were relied upon by the district court were inappropriate and not the statutory criteria.

INTRODUCTION

The history of relocation assistance is replete with the failures of government programs to minimize the terrible impact of forced displacement upon the families and individuals involved.[9] Relocation assistance was unnecessary when few displacements occurred and when condemnations involved predominantly unimproved land.[10] But with the

9. See, *The Legal Lawbreaker: A Study in Official Lawlessness Regarding Federal Relocation Requirements*, Citizens Advocate Center (Wash., D.C., July, 1970) and Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY (J. Wilson, ed. 1966) at 359 and Hartman, *The Housing of Relocated Families*, 30 J. Am. Inst. Planners 266 (1964)

10. A Massachusetts statute enacted in 1639 granted authority to lay out roads, "provided always it occasioned not the pulling down of any man's house, or laying open any garden or orchard." 1 Nichols, EMINENT DOMAIN § 1.22 [2] (1964)

tremendous recent increases in urban populations metropolitan facilities have become overloaded, the central cities increasingly blighted, and large-scale government programs have been required to physically rehabilitate the urban environment. In their rush to make the necessary physical improvements, governments at all levels neglected the needs of the persons displaced.[11] Typically, government officials treated statutory relocation duties as unimportant preliminaries to the more dramatic tasks of constructing the improvements; displacees were regarded "as unfortunates to whom nothing is owed, but to whom something might be given."[12] As problems of displacement and relocation were compounded, they finally began to receive serious study on the federal,[13] state[14] and municipal[15] level.

In the early 1960's, during a period of intensive construction of Federal-aid highways, it began to appear that the

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11. National Commission on Urban Problems, *supra.*, n. 5, p. 153.

12. Note, *The Interest of Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 Stan. L. Rev. 810, 803-804 (1969).

13. See, e.g., Select Subcommittee on Real Property Acquisition, Committee on Public Works, House of Representatives, 88th Cong., 2d Sess., *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs* (Comm. Print 1964); U.S. Advisory Commission on Intergovernmental Relations, *Relocation: Unequal Treatment of People and Businesses Displaced by Governments* (1965); *Highway Relocation Assistance Study*, supra., n. 5.

14. In 1965 the California Legislature commissioned the California Law Revision Commission to study condemnation and relocation assistance. Cal. Stats.1965, res. ch. 130, p. 5,289. In part as a result of that study, the Legislature recently enacted *Highway Relocation Assistance Study, supra.*, n. 5.

15. See, e.g., Panuch, *Relocation in New York City*, (1959), which was commissioned by the Mayor of New York in 1957.

highway program was having a disproportionately adverse effect on persons forcibly displaced from housing in the path of proposed highways and was otherwise imposing intolerable burdens on certain urban communities and neighborhoods. The persons who thus suffered from the highway program were invariably poor and frequently members of racial minority groups. Thus, in enacting the Federal-Aid Highway Act of 1966, Congress directed that a study be made of the relocation problem with special emphasis on the adequacy of relocation payments and assistance rendered.[16] The resultant *Highway Relocation Assistance Study* was submitted by the DOT to Congress in July, 1967.[17] The *Study* indicated that about 168,000 individuals, families, businesses, farmers and non-profit organizations would be displaced during the three-year period commencing July 1, 1967. About 23 percent would be located in rural areas and 77 percent in urban areas. It showed that such prospective displacees tended to occupy low-cost housing.[18] In this connection, the *Study* also pointed out that "[m]any State highway departments reported that a major difficulty in relocating low or moderate income families is the shortage of low-rent housing, "either public or private."[19]

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16. Public Law 89-574, 89th Cong., Sept. 13, 1966.

17. *Supra.*, n. 5.

18. "Estimates reveal that the greater number of displacements will involve the midrange or lower cost housing." *Ibid.*, p. 6. According to figures contained in the *Study*, 86,154 of the individuals and families to be displaced owned their own homes; 60,796 were tenants. Values of the 86,000 residential properties to be taken were: 27% at $6,000 or less; 46% at $6,000 to $15,000; and 27% at over $15,000. Rental paid by the 61,000 tenants to be displaced were: 41% at less than $60 per month; 43% at $60 to $110 per month; and 16% at over $110 per month. *Ibid.*, p. 43.

19. *Ibid.*, p. 6.

The relocation problem figured prominently in the congressional hearings on the Federal-Aid Highway Act of 1968 and related legislation. Moreover, during the course of such hearings, Francis C. Turner, then Director of the Bureau of Public Roads and now Federal Highway Administrator, disclosed that the 1967 *Highway Relocation Assistance Study* had under-estimated the number of displacements from housing that would be caused by the construction of highways during 1967-1970. Mr. Turner stated that "in fiscal 1968, the Federal-aid highway program alone effected some 33,000 displacements. During the present fiscal 1969 we anticipate about 56,000 displacements in this program."[20]

The magnitude and gravity of the relocation problem was indicated also by Lowell K. Bridwell, then Federal Highway Administrator, who in 1968 stated before a Congressional committee that:

> ". . . relocation assistance, in my opinion, is one of the most serious problems facing us in the Highway Administration and the Bureau of Public Roads, and one of the most serious problems facing the progress of the Federal-aid highway program . . . . Without question, I think any rational examination of the problems that we face in the progress of the Federal-aid highway program has to have as one of its big parts the problems of displacing persons . . . .
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> "Frequently, homeowners who must relocate face higher costs than they had formerly. In some cases, this results because there is no suitable housing comparable in price to what these owners left. This seems likely to be the case for many of those to be relocated from highway rights-of-way. . . .
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20. *Hearings* before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, on S.1, the Uniform Relocation Assistance and Land Acquisition Policies Act of 1969, U.S. Senate, 91st Cong., 1st Sess., p. 216.

"How serious a problem relocation may be for residents depends on such matters as their age, income and race and on the amount and cost of vacant land and replacement housing in the area. In one study of elderly homeowners, a majority of the resettled owners stated that the displacement had adversely affected their financial position.[21]

The Federal-Aid Highway Act of 1968, 23 U.S.C. § 501 *et seq.*, (also known as the Highway Relocation Assistance Act of 1968, and hereinafter referred to as the "1968 Act") was a direct response to the relocation problem and is entirely addressed to its alleviation. The Committee Report which accompanied the Senate bill which was to become the 1968 Act, stated the results of Senate Hearings on the bill as follows:

"Hearings began on December 14, 1967, and were concluded on May 28, 1968. During the 12 days of hearings, 36 witnesses were heard. These witnesses included officials of various Federal agencies; officials from State and local governments and agencies; representatives of the engineering, highway and urban planning, and architectural professions, sociologists and others from the academic world, as well as individuals from other interested groups.

"As the hearings progressed it became obvious that the same range of problems was being identified and discussed by each witness. It also became apparent that these problems fell into [the same areas] . . . ."

"*The most pressing of these problems and the one most deserving of the immediate attention of the Congress in the committee's view is the inequitable treatment of persons or businesses displaced by highway construction.* Accordingly, the committee has proposed

21. Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, on S.698, S.735, S.458 and S.2981, 90th Cong., 2nd Sess., pp. 425-427.

legislation, . . . as reported, which will aid significantly in reducing the hardship of those who suffer private injury for the public benefit.

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"The evidence showed . . . that, *because urban interstate highways often go through rundown, dilapidated, low-income, or so-called disadvantaged areas, those persons least able to afford dislocation are frequently the ones who are forced to move by our highway programs.*

"In this regard it was pointed out that *often when persons are displaced from these areas there is no housing or replacement property available for their relocation. People are thus forced to move, but have no place to go; or if other housing or replacement housing does exist, it is usually well beyond their financial capabilities.* The evidence clearly shows that there is a definite need for procedures which provide for comparable replacement housing and property *at the time such displacement occurs.*"[22] (Emphasis added.)

In enacting the 1968 Act, Congress included the following "declaration of policy" in the first section thereto (23 U.S.C. § 501):

> Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and non-profit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways *is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.* Therefore, Congress declares that relocation payments and advisory

22. Report of the Committee on Public Works, U.S. Senate, to accompany Senate Bill No. 3418, the Federal-Aid Highway Act of 1968. Report No. 1340, 90th Cong., 2nd Sess., June 28, 1968, pp. 5-7.

> assistance should be provided to all persons so displaced in accordance with the provisions of this title. (Emphasis added.)

In order to effectuate this declaration of policy, Section 502 of the 1968 Act provides that the Secretary of the DOT shall not approve any Federal-aid highway project which will cause the displacement of any person or business unless he received "satisfactory assurances" from the State highway department that "fair and reasonable relocation and other payments shall be afforded displaced persons";[23] that "relocation assistance programs . . . shall be afforded to displaced persons";[24] and, most important of all, that:

> within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.[25]

Section 508 of the 1968 Act requires each state to provide "a relocation advisory assistance program" which shall include such measures, facilities or services as may be necessary or appropriate in order "to determine the needs, if any, of displaced families and individuals . . . for relocation

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23. 23 U.S.C. § 502(1).

24. 23 U.S.C. § 502(2).

25. 23 U.S.C. § 502(3). As is discussed *infra*, n. 75, this statute, like a number of others pertaining to displacement from various federal programs, was modelled after and is almost identical to the federal statute governing urban renewal relocation. 42 U.S.C. § 1455(c)(1).

assistance,"[26] and to assure that the requirements of Section 502 can be met.

Pursuant to specific statutory authorization,[27] the Secretary of the DOT issued detailed regulations which define and expand the provisions of the above statutes. Initially these regulations were contained exclusively in DOT Instructional Memorandum ("IM") 80-1-68, dated September 5, 1968, issued two weeks after the effective date of the 1968 Act. Thereafter, IM 80-1-68 was amended on several occasions, primarily to make certain adjustments in provisions relating to relocation payments[28] and to conform other provisions to requirements of the Civil Rights Act of 1968.[29]

These fairly enlightened relocation requirements have unfortunately had little effect in the actual administration of the federal-aid highway program. Recent hearings before the House Committee on Public Works[30] revealed that in the informed opinion of the independent experts who testified, the DOT had "engaged in, and knowingly tolerated, a pattern of pervasive evasion" of the relocation statutes.[31]

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26. 23 U.S.C. § 508(a).

27. 23 U.S.C. § 510(a)(b).

28. On October 2, 1968, paragraph 9c(2) of the IM was revised to make certain owner-occupants eligible for a payment of up to $4,500 for use as rent supplement or down-payment on the purchase of a dwelling.

29. On November 15, 1968, various provisions of paragraph 5 of the IM were revised to require that the replacement housing to be provided displacees must be "available to persons without regard to race, color, religion or national origin." See, e.g., IM 80-1-68, paragraph 5a(5).

30. Hearings before the Committee on Public Works, House of Representatives, 91st Cong., 1st and 2nd Sess., on H.R. 14898, H.R. 14899, S.1 and related bills.

31. *Ibid.*, Statement of Edgar S. Cahn, pp. 370-379. Dr. Cahn's statement contained the following conclusion:

Similarly, a comprehensive and heavily documented report on relocation recently issued by a citizens organization in Washington, D.C. also concluded that the DOT and HUD had "lawlessly" and consistently ignored federal relocation requirements.[32] The DOT's noncompliance with federal law and its own regulations in connection with highway relocation has thus proved remarkably similar to the dismal and

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The history of statutory relocation requirements—twenty years of them—is that they are ignored, they are evaded, they are not enforced. Codification of the hodgepodge that now exists and creation of a uniform procedure drawn from the best features of various agencies will not and cannot, standing by itself, change the fundamental historical fact that the Executive branch pursues a more fundamental relocation procedure:

"See no evil; hear no evil; speak no evil."

For, let us be very candid, the Executive branch—and particularly HUD and DOT—have long engaged in, and knowingly tolerated, a pattern of pervasive evasion of statute after statute, congressional mandate after congressional mandate, and court case after court case.

The record leaves no room for doubt regarding relocation requirements. For the past twenty years there has been a pattern of official lawlessness on the part of the Federal Government which must be arrested.

It can hardly be said that Congress has been coy or ambiguous regarding the duty of the federal government and the priority importance it assigned to adequate relocation. On six separate occasions Congress has stated and then restated its wishes, each time in more stringent, explicit and mandatory terms.

See also statement of Yale Rabin, urban transportation planning consultant and member of the American Institute of Planners, *Ibid.*, pp. 479-485; and statement of Gerald P. Norton, first vice president, Metropolitan Washington Planning and Housing Association, *Ibid.*, p. 187.

32. *The Legal Lawbreakers: A Study in Official Lawlessness Regarding Federal Relocation Requirements,* Citizens Advocate Center (Washington, D.C., July, 1970) See also, Roberts, *Highway Relocation Planning and Early Judicial Review,* 7 Harv. Jour. on Legis. 179, 180 (1970).

extraordinarily well documented record of non-enforcement of almost identical urban renewal relocation requirements.[33]

The inability of the DOT to compel state highway departments to comply with the relocation requirements of the 1968 Act and implementing regulations soon become apparent, not only to independent observers and the affected public, but as well to some senior federal Highway officials.[34] In a press conference on February 16, 1970, reported in the *Wall Street Journal*, Secretary Volpe announced that "Federal efforts will be stepped up to insure that the 1968 highway laws' provisions for decent housing are enforced" and that "the availability of adequate replacement housing, either already built or planned, must be assured for initial federal approval of any [highway] project, and the new housing must be built before construction is authorized."[35]

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33. See, e.g., Report to the Congress by the Comptroller General of the United States: *Opportunity to Improve Allocation of Program Funds to Better Meet the National Housing Goal* (October 2, 1970); Tondro, *Urban Renewal Relocation: Problems in the Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. Pa. L. Rev. 183 (1968); Note, *Urban Renewal: Problems of Minimizing and Preventing Urban Deterioration*, 71 Harv. L. Rev. 504 (1959); Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal*, 1949-1962 (MIT Press 1964); Greer, *Urban Renewal and American Cities* (Bobbs-Merrill, 1965). See also *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968); *Powelton Civic Home Owners Association v. Dept. of Housing and Urban Dev.*, 284 F. Supp. 809 (E.D. Pa. 1968); and *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968).

34. The fact that the DOT was running into "revolt" by state highway departments disinclined to comply with new federal hearing procedures was noted by Alan S. Boyd, then Secretary of Transportation, at Congressional hearings. See *Hearings* before the Subcommittee on Roads of the Committee on Public Works, U.S. House of Representatives, 90th Cong., 2nd Sess., on H.R. 17134 and Related Bills, May 23, 1968, pp. 234-235.

35. *Wall Street Journal*, February 17, 1970, p. 4, col. 2. This article also quotes "department sources" as adding that: "In many instances . . . highway projects have moved along without replacement housing being made available to those whose homes are in a road's path, or the quality of replacement housing provided has been low." *Ibid.* The Wall Street Journal article is reproduced in *Hearings* before the Committee on Public Works, House of Representatives, *supra*, n. 30, p. 478.

He added that,

> . . . in accordance with the Civil Rights Act of 1968, efforts will be made to see that all replacement housing is fair housing, meaning open to all persons regardless of race, color, religion, national origin or sex, under the new Department policy.[36]

Two months later, on April 6, 1970, Secretary Volpe convened another press conference at which he was reported as "insisting that any highway projects that would demolish houses be *held up* until decent replacement housing is assured."[37] Less than a week later, on April 10, 1970, the Secretary put the power of his office behind his public statements by issuing DOT *Circular Memorandum* dated April 10, 1970 entitled *Relocation Assistance-Availability of Replacement Housing.*[38] This Circular Memorandum, which by its terms applies to all Federal-aid highway projects authorized prior to May 1, 1970 on which displacement has not been completed, states in material part as follows (emphasis added):

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36. *Ibid.* The article also ascribes to Department of Transportation "sources" the explanation that "this means, for example, that if a Negro is forced to move from a black ghetto because of a new highway and doesn't want to move into another all-black area because he's concerned that the homes may be low-grade ones, he must be provided with integrated housing."

37. Wall Street Journal, April 7, 1970, p. 1, Col. 1 (Emphasis added.) See also Memorandum of Secretary of Department of Transportation: *Implementation of Replacement Housing Policy*, January 15, 1970, and statement of Frank C. Turner, Administrator of the Federal Highway Administration, at *Hearings* before the Subcommittee on Roads of the Committee on Public Works, House of Representatives, 91st Cong., 2nd Sess., on H.R. 16788 and related bills, p. 995.

38. This Circular Memorandum is the one referred to below in the dissenting opinion of Circuit Judge Sobeloff, 429 F. 2d 423 at 425 n. 5, although Judge Sobeloff inadvertently noted the date of the subject Memorandum as March 27, 1970. In fact, March 27th was the date of the "White Circular Memorandum" which was superseded by the Circular Memorandum of April 10th.

The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, *or permit the dislocation of individuals or families on any such project or on any project already authorized;* until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

Such replacement housing shall be:

a. Fair housing—open to all persons regardless of race, color, religion, sex, or national origin.

b. In areas not generally less desirable in regard to:
   1. Public utilities
   2. Public and commercial facilities

c. Available at rents or prices within the financial means of the families and individuals displaced.

d. Decent, safe and sanitary.

e. Reasonably accessible to the displacees' places of employment.

f. Adequate to accommodate the displacee.

Since issuing the April, 1970 regulations, the Secretary has publicly testified that "[t]he construction of urban freeways has been a disruptive force in some of our urban areas and perhaps accelerated the process of central city decay."[39] This is understatement—particularly in view of the fact that the billions upon billions of dollars regularly

39. *Hearings* before the Subcommittee on Roads of the Committee on Public Works, House of Representatives, *supra*, n. 37, p. 948.

appropriated for federal-aid highways[40] far exceed the funds available for urban redevelopment and subsidized housing programs. These latter programs are thus unable to repair the human and physical damage wrought by the overfinanced bulldozers of state highway departments.

There are a number of obvious reasons for the failure of the DOT and state highway departments to even approach compliance with the relocation requirements. First, as in the case of federal programs administered by other executive departments,[41] the DOT is in the position of relying almost entirely on state officials not only to develop the specific standards implementing the relocation requirements, but also to provide the information necessary to determine in advance whether the statutory criteria can be met. The success of these state officials will depend, not upon their success in relocating displacees, but in completing highway projects as rapidly as possible. To compound the problem, the DOT also depends upon state highway officials for the information necessary to evaluate state compliance with the standards in carrying out reloca-

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40. The cost of completing the Interstate System, as submitted to Congress in 1968, was $56.5 billion. Report of the Committee on Public Works, U.S. Senate, *supra.*, n. 22, p. 3. A total of $5.044 billion was made available for obligations of the federal-aid highway program for only the nine month period from July 1, 1969 through April 1, 1970. CCH. URBAN AFFAIRS REPORTS, ¶ 18,675. A total of $1.25 billion is available for obligations during just the first quarter of fiscal 1971. *Ibid.*, ¶ 18,759. The colossal cost of the highway program may also be illustrated by the fact that 20 miles of planned highway in Chicago will cost approximately $1 billion. *Hearings* before the Subcommittee on Roads of the Committee on Public Works, House of Representatives, *supra*, n. 38, p. 955. The distribution of funds among the states is published in DOT *Instructional Memorandum* 30-5-70.

41. See, Tondro, *supra.*, n. 33, p. 198.

tion.[42] This wholesale turnover of the highway program to state officials likely to adopt a biased view of the relocation problem[43] reflects the DOT's response to pressures on itself. The state highway department, not politically impotent or racially oppressed displacees, is the DOT's recurring "client"; without state highway departments' willingness to undertake further projects, certain constituent agencies of the DOT would find it difficult or impossible to continue operating.[44] But by identifying so closely with one point of view, the DOT in its supervision of relocation, has become yet another regulatory agency now controlled by the very interests it was designed to regulate.

A further reason for the failure of enforcement of the relocation requirements emerges out of the fact that "[t]hose involved with the problem on the state level are usually state highway department engineers with practically no training or experience in understanding and dealing with the complex social and economic problems of the displaced person."[45] If officials of local redevelopment agencies, who are far more experienced with the problems of relocation[46] and more regularly concerned with it, can

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42. See IM 80-1-68, paragraph 7a(3) and 7b(1).

43. As stated in *Hartman, supra,* n. 9, at 280:

> [O]ne must question whether local authorities are free to judge and report on the results of their relocation operations in an objective and impartial manner. In effect, the local agency may have no choice but to issue extremely positive relocation reports: anything less than this might produce legal, political, and technical conflicts and could slow up or curtail the entire rebuilding effort, which is the principal goal of the authority and its program.

44. See Roberts, *supra.*, n. 32, at 191.

45. *Ibid.*, pp. 181-182.

46. The urban renewal relocation requirements were initially enacted as part of the Housing Act of 1954, P.L. 88-560, 78 Stat. 769, 786.

be lax with the rights of displacees,[47] it is unlikely that highway officials are apt to be more assiduous in their responsibilities. Because of their inexperience and desire to avoid matters which may hinder or delay the construction of a highway, it has been suggested that highway officials "may attempt to gain initial approval for their proposed projects by submitting false or obsolete data concerning relocation to the [DOT]."[48]

ARGUMENT

I. The Federal Relocation Requirements Apply to Benefit and Protect All Residents of a Federal-Aid Highway Project Not Yet Displaced on the Date of Their Enactment.

Amicus will not here reiterate the compelling arguments amply set forth in petitioners' brief and in Judge Sobeloff's dissenting opinion below in support of application in this case of the 1968 Act and implementing regulations. Such application is warranted, however, not only by the plain statutory and regulatory language, the legislative history and relevant decisional law, but as well by the

47. See *Tenants and Owners in Opposition to Redevelopment v. Romney*, No. C-69-324 (N.D. Cal. April 29, 1970) where the court noted that "[t]he evidence . . . is overwhelming in establishing that [officials of HUD and the local redevelopment agency] have not met the mandate of Congress laid down in [the urban renewal relocation statutes . . . which] make it abundantly clear that Congress intended residents of blighted areas to be beneficiaries, not victims, of urban renewal." Slip Opinion, pp. 31-32. See also, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968); *Powelton Civic Home Owners Association v. Dept. of Housing and Urban Dev.*, 284 F. Supp. 809 (E.D. Pa. 1968) and *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968).

48. Roberts, *supra.*, n. 32, p. 180. The practice of submitting inaccurate and often deliberately misleading data concerning relocation is authoritatively reported as widespread among local redevelopment agencies. See, e.g., Tondro, *supra.*, n. 33, p. 194, and authorities therein cited and discussed.

fact that non-application of the law in this case would have a terrible impact nationally upon thousands of impoverished displacees—an effect not intended by Congress.

During its deliberations on the 1968 Act, Congress understood that the planning and construction of federal-aid highway projects was an exceedingly lengthy process and that, for example, 8 to 10 years may elapse between the initial proposal of a particular project and actual construction.[49] During this protracted period the state highway department must seek and obtain from the DOT "corridor" or route approval and, subsequently, design approval. Each of these approvals can be given only after the highway department has held appropriate public hearings.[50] Thereafter, the state must submit "plans, specifications and estimates" limited to the acquisition of right-of-way.[51] Lastly, the DOT must approve new and different "plans, specifications and estimates" regarding the construction stage.[52] It is this last approval which constitutes "final approval." Such approval was never given with respect to I-77, and that highway project has therefore never been finally approved. Therefore, the statement in the District Court's opinion that the I-77 project "was finalized some five years ago"[53] is legally unfounded and misleading.

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49. Report of the Committee on Public Works, U.S. Senate, *supra.*, n. 22, p. 10. On June 10, 1970, Secretary Volpe testified at congressional hearings that urban interstate projects, such as I-77, would normally require 6 years of planning and construction. HEARINGS before the Subcommittee on Roads of the Committee on Public Works, House of Representatives, *supra.*, n. 37, p. 979.

50. DOT *Policy and Procedure Memorandum 20-8*

51. *DOT Policy and Procedure Memorandum 21-7.*

52. For a detailed description of some of the factual and legal distinctions between corridor approval, design approval, acquisition approval and construction or "final" approval, see *D.C. Federation of Civic Associations v. Volpe*, 316 F.Supp. 754, 774 *et seq.*, (D.D.C. 1970)

53. 314 F. Supp. at 31

It must be emphasized in this connection that the majority of highway displacements invariably occur during the actual construction stage. (And it is for this reason that numerous prospective displacees are still resident in the Triangle area notwithstanding the fact that the DOT approved acquisition of right-of-way for I-77 approximately four years ago.) Thus it is highly significant that, pursuant to paragraph 7b of IM 80-1-68, the state highway department's relocation plan may be submitted to the federal division engineer just prior to proceeding with construction.[54]

Since the DOT has not granted construction approval for the subject portions of I-77 on the effective date of the 1968 Act, and since no residents of the Triangle area had been displaced at that time, application of paragraphs 5 and 7 of IM 80-1-68 would have imposed no serious burden on the project. In view of the fact that completion of the project will, in any event, probably require many years, delay of a few months still would be a relatively small price to pay for the protection thus afforded displacees.

On June 28, 1968, the date the 1968 Act was reported out of the Senate Committee, there were 8,500 federal-aid highway projects underway which, like the I-77 project, had received design or right-of-way acquisition approval but were not yet in the construction stage.[55] Collectively

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54. Paragraph 7b states in material part as follows:
Right-of-Way Acquisition and/or Construction Stage.
The State highway department, *prior to proceeding with* right-of-way negotiations and/or *construction* shall furnish the following information for review and approval by the division engineer. . . . (Emphasis added)

55. Report of the Committee on Public Works, U.S. Senate, *supra.*, n. 22, p. 3.

these projects will cause (or may in part already have caused) over 100,000 residential displacements.[56] The majority of such displacees were low-income persons,[57] precisely those of pre-eminent concern to Congress.[58] Therefore, had Congress intended to deny the benefits of the 1968 Act to displacees of on-going projects, it must be assumed such an intent would have been expressed in the statute—as it was expressed in similar statutes on analogous occasions.[59] Since such an intent was not expressed, it must be presumed not to have existed.

Not only does the 1968 Act contain no language restricting application to highway projects initially commenced after its effective date, but the regulations promulgated pursuant to the Act justify the conclusion that such restriction was never even contemplated by the DOT. The terms of Paragraph 2b(2) and (3) of DOT *Instructional Memorandum 80-1-68* (which state that provisions of the IM

56. The *Highway Relocation Assistance Study*, *supra.*, n. 5, stated, at p. 5, that 146,950 families and individuals would be displaced during the three-year period commencing July 1, 1967. In view of the length of the highway planning process, it must be assumed that the projects causing these displacements received most preliminary approvals prior to August 23, 1968.

57. *Ibid.*, p. 6.

58. See 23 U.S.C. § 501 and Report of the Committee on Public Works, U.S. Senate, *supra.*, n. 22, p. 7, wherein the Committee noted that "because urban interstate highways often go through rundown, dilapidated, low-income or so-called disadvantaged areas, those persons least able to afford dislocation are frequently the ones who are forced to move by our highway programs."

59. As noted elsewhere by petitioners, Congress specifically prohibited the application of the 1962 highway relocation amendment to projects approved prior to its enactment. 23 U.S.C. § 133(e). And in adopting relocation requirements for urban renewal which are very similar to those here at issue, Congress expressly stated that the new requirements did not apply to projects in which HUD had already approved planning grants. See also, § 106(f) and (h) of the Housing Act of 1949, 42 U.S.C. 1455(f) and (h), which pertain to replacement housing facilities for persons displaced by urban renewal projects.

are applicable to projects "authorized" before August 28, 1968 on which individuals and families have not been displaced) make it eminently clear that these regulations were intended to apply to all highway projects from which, as of the effective date of the statute residents were yet to be displaced, regardless of when they received initial federal authorization. This conclusion is further supported by the terms of Paragraph 5a of IM 80-1-68 which provides that no state highway department shall be authorized to proceed with "any *phase* of any project which will cause the displacement of any person. . . . ," until it has furnished satisfactory assurances concerning relocation. (Emphasis added.) The first sentence of paragraph 5b of the IM, which standing alone might warrant the opposite conclusion, is immediately qualified in the next following sentence, which provides that the state "will pick up the sequence at whatever point it may be in the acquisition program" on the issuing date of the regulations. On September 5, 1968 (the date of issuance of IM 80-1-68) West Virginia highway authorities had not received federal authorization to proceed with construction of the subject portions of I-77, the "phase" which would cause displacement, and the project was still in the acquisition stage. No residents of the Triangle area had been forcibly displaced at that date. The conclusion is therefore inescapable that the relocation requirements were intended to apply with full force to the I-77 project as part of the "sequence" to be "picked up" at whatever point it may have been in the acquisition stage.

Moreover, as petitioners have shown, even indulging the unwarranted assumption that the first sentence of paragraph 5b of the IM should be read as if in a vacuum to justify non-application, the issuance of DOT *Circular Memorandum dated April 10, 1970,* while the appeal below was

pending, would still operate to effectively require application. *Thorpe v. Housing Authority of the City of Durham.*[60]

The instant appeal is not the first in which an appellate court has been asked to rule upon application of the 1968 Act and implementing regulations to a particular project commenced prior to their enactment. In *D.C. Federation of Civic Associations v. Volpe,*[61] which involved the Three Sisters Bridge project in Washington, D.C., one of the issues confronting the Court of Appeals for the District of Columbia was whether a so-called "design public hearing" required by new DOT regulations must be held in view of the alleged fact that the DOT had given design approval prior to the effective date of the regulations. The district court never reached this issue, since it granted summary judgment for appellees after concluding that the alleged violations of the 1968 Act and regulations would not be considered because "Congress intended that the District of Columbia commence construction of the Bridge project as soon as possible, and that no further planning or hearing requirements of Title 23 need be complied with."[62] The court of appeals reversed this lower court decision and remanded for a factual determination whether location approval was obtained prior to the effective date of the regulations. Circuit Judge Wright, writing for the majority, pointed out that

> Since these road projects may irreparably affect or destroy basic rights—for example, the basic right of a citizen to live in his home—we must carefully and meticulously scrutinize any proposal which would deny to some their federally created right to influence the course of a highway in their neighborhood to determine

60. 393 U.S. 268

61. Civil No. 23,870 (D.C. Cir. April 6, 1970)

62. *Ibid.*, Slip Opinion, p. 2

whether this discrimination is "necessary to the accomplishment" of the congressional objective—a federally financed interstate highway system.[63]

In a separate concurring opinion Judge Bazelon recognized that there was some ambiguity in the 1968 Act as to whether particular provisions were intended to apply to the Three Sisters Bridge Project. He agreed that the ambiguity should be resolved in favor of application, not only because there were no "explicit criteria" in the statute justifying non-application to that particular project, but as well because such an interpretation

> . . . avoids treating District residents less favorably than all other citizens with respect to the federal highway system. . . . Apart from constitutional considerations, we should not lightly presume that Congress has deprived District residents of an opportunity afforded to all other citizens, at least in the absence of the clearest legislative mandate, which is lacking here.[64]

While the facts in the *D.C. Federation* case are not perfectly analogous to those here presented, the reasoning of Circuit Judges Wright and Bazelon is nevertheless highly relevant. Respondents would deny to residents of the Triangle protections and benefits which may well effect their basic right to decent, safe and sanitary housing. This Court has frequently recognized that adequate housing is "a necessary of life."[65] And by determining where one lives, housing also determines access to jobs, education and recreation. Therefore, where, as here, a statutory scheme

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63. *Ibid.*, Slip Opinion, p. 14

64. *Ibid.*, Slip Opinion, pp. 2-3 (separate concurring opinion of Bazelon, J.)

65. *Block v. Hirsh*, 256 U.S. 135, 156; *Shapiro v. Thompson*, 394 U.S. 618,627.

involves such a fundamental human need, this Court must "carefully and meticulously" scrutinize a proposed interpretation which would deny to many thousands of poor persons the federally created right to adequate relocation housing.[66]

It is interesting to note that upon remand of *D.C. Federation* the district court also rejected the statutory interpretation again sought by DOT officials. After considering at length the extensive testimony of such officials, including that of Secretary Volpe himself, and after recognizing "the deference which it must give to the interpretation of administrative regulations by the administrative officials who promulgate and enforce them",[67] the court nevertheless rejected their proposed interpretation as "unreasonable and inconsistent with the purpose of [the regulations.]"[68] In effect, then, both the court of appeals and the district court considered the basic rights of the affected public too important to be ignored on the basis of highly technical, and indeed specious, arguments concerning the purported

66. As also pointed out by Judge Wright:

> If we were to accept appellees interpretation of Section 23, we would be confronted with difficulties, possibly of constitutional magnitude. The provisions [of the 1968 Act] listed above are the essential safeguards which Congress has established, on a nationwide basis, to ensure that massive freeway projects are not constructed unless there has been a good faith effort on the part of the state and local planners to take community needs and resources into consideration . . . . The Secretary of Transportation is charged with overseeing the planning and may not approve road projects, thus allowing them to be built with federal funds, until he finds that all these considerations have been properly taken into account. *D.C. Federation of Civic Associations v. Volpe*, supra, Slip Opinion, pp. 5-6

67. *D.C. Federation of Civic Associations v. Volpe*, 316 F.Supp. 754, 784 (D.D.C. 1970)

68. *Ibid.*, 316 F.Supp. at 785.

"non-retroactivity" of regulations designed to protect the public interest. This Court must do no less.

II. In the Absence of a Satisfactory Relocation Plan, Evidence of a State Highway Department's Ability to Provide Adequate Replacement Housing for Particular Displacees Is Factually and Legally Irrelevant.

In proceedings below the district court apparently relied upon the testimony of federal and state highway officials that "appropriate" replacement housing could be found, and that "no one will be displaced unless suitable (i.e., decent, safe, and sanitary) and lawful relocation housing is available . . ."[69] The district court also concluded that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor."[70] These statements are not only erroneous as a matter of fact, as petitioners demonstrate, but are judgments which must in the first instance be made by the Secretary of the DOT, not the courts.[71] Moreover, and

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69. 314 F. Supp. at 30.

70. *Ibid.*, at 31

71. The proper function of the courts in relocation cases such as this was stated in *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 441 (N.D. Cal. 1968):

> This injunctive relief does not mean that this court is presumptuously attempting to administer the complexities of urban redevelopment. That is not the function of the court nor is the court administratively equipped to do so. Nor does it mean that this court is attempting to substitute its judgment for that of the Secretary concerning the "satisfactoriness" of the local agency's relocation plan.
>
> Our decision simply means that the court can and should see to it that the Secretary complies with the requirements of the federal statute, and his own regulations, not merely in form but in substance, and that the administrative discretion vested in him by law is not arbitrarily abused, as in this case, but is reasonably exercised with some substantial basis in fact to support it. Such is the traditional function of the court upon review of administrative action of the kind here involved.

perhaps most important, the district court did not base its judgments about the availability of relocation housing on relevant statutory criteria.

The 1968 Act was designed, not simply to insure that displacees were adequately rehoused, but as well to insure that such relocation did not generate untoward repercussions in local housing markets. It is for this reason that the regulations require development of a "relocation program plan"[72] which, among other things, takes into consideration concurrent displacement from other federal, state or local programs and private activities as well as competing demand generally.[73]

Paragraph 7 of IM 80-1-68, which pertains to planning for the relocation program, relates in many respects to Section 508 of the 1968 Act. This section, like Section 502, was modelled after Section 105(c) of the Housing Act of 1949,[74] which concerns urban renewal relocation.[75] Because the urban renewal planning, administration, and evaluation guidelines are older, and have received far more judicial attention[76] than those regarding federal-aid highways, the urban renewal cases are highly relevant for

72. DOT *Instructional Memorandum* 80-1-68, para. 7

73. *Ibid.*, para. 7(c)

74. 23 U.S.C. § 1455(c)

75. This early relocation statute was also the model for similar statutes relating to other federal housing programs. See, e.g., 42 U.S.C. § 1415(7)(b)(iii) (public housing); 42 U.S.C. § 3307(a) (demonstration cities program); and 49 U.S.C. § 1606(a) (urban mass-transportation program).

76. See, e.g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968); *Powelton Civic Home Owners Civic Association v. Department of Housing and Urban Development*, 284 F. Supp. 809 (E.D. Pa. 1968); *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968); *Garrett v. City of Hamtramck*, No. 32004 (E.D. Mich. S.D., March 7, 1969) (unreported decision); *Tenants and Owners in Opposition to Redevelopment v. Romney*, No. C-69-324 (N.D. Cal. April 29, 1970); *Talbot v. Romney*, No. 2402 (S.D.N.Y., August 20, 1970).

purposes of interpreting the highway relocation guidelines. Many of the urban renewal relocation cases emphasize that whether a local agency has complied with federal relocation requirements is *not* to be determined solely on the basis of whether it can find adequate replacement housing for particular displacees (and certainly not on the basis of undocumented speculations such as were relied upon below). For example, in *Powelton Civic Home Owners Association v. Dept. of Housing and Urban Dev.*,[77] the court observed that:

> In determining the availability of satisfactory relocation facilities, the Secretary's inquiries will be directed towards the ascertaining of general statistical facts: What are the general conditions in the new housing market? What are the competing demands from other housing consumers? What are the general needs of the displaced families? [citations] The peculiar problems of one individual or of one family within the project site will not be relevant to the Secretary's determination.[78]

As in the context of urban renewal, West Virginia highway officials' purported ability to obtain adequate replacement housing in Charleston for displacees of I-77 is not the sole or even the most important test under the 1968 Act. For even assuming this goal could be achieved, the costs of achieving it might well be to deprive others of housing who are equally in need, drive up rents, decrease mobility, and further impact the Charleston housing market. Unless a state highway department has gathered and evaluated information concerning concurrent displacement and other factors relat-

77. 284 F. Supp. 809 (E.D. Pa. 1968)

78. *Ibid.* at p. 829. See also, *Tenants and Owners in Opposition to Redevelopment v. Romney*, No. C-69-324 (N.D. Cal April 29, 1970) Slip Opinion, p. 31.

ing to the local demand for and supply of housing, there can be no assurance that even the successful relocation of displacees will not create a new housing problem or worsen an existing one.

So far as is shown by the record, respondents have no reliable information on relevant vacancy rates in Charleston; no current information on rent ranges or prices of available housing; no information concerning the amount of available housing which conforms to housing codes and is "decent, safe and sanitary"; no information on the number of otherwise available housing units to be demolished as a result of urban renewal, code enforcement or private development; no information on the proximity of available housing to public transportation; and no information on whether and, if so, how much housing is available without regard to race, color, religion or national origin. Similarly, respondents submitted no accurate and up to date information as to the rent ranges or sale prices which are within the financial means of persons to be displaced from the Triangle; no information on the location of their places of employment; and no information as to special housing needs of particular displacees. Finally, respondents have no data concerning competing demand for available housing generated by concurrent displacement from urban renewal, code enforcement, other government and private activities or simply by the natural increase of demand over supply such as is occurring in most urban areas. Without these findings, which pursuant to the regulations must be submitted to the DOT[79] along with a statement of the basis upon which they were made,[80] neither the Secretary nor

79. DOT *Instructional Memorandum* paras. 7a(1)(2), 7b(1)(2)(3)

80. *Ibid.*, para. 7a(3)

the courts can rationally determine whether displacees can be absorbed into existing and adequate replacement housing without impacting the local housing market. Since this information was never submitted to the DOT, nor presumably even obtained, the district court's judgment that respondents were in "substantial compliance" with the 1968 Act was without any foundation in the record and an abuse of judicial discretion.

On the basis of what they saw as "urban suicide in the Nation's capital"[81] some members of the legislative committee which reported out the House version of the 1968 Act included in the Committee Report their views in opposition to certain provisions in the bill. These included the following dire predictions of the effect highway displacements would have on the city.

> Many thousands of District families will be unnecessarily displaced, and the burden of this forced dislocation will bear heaviest, and cause untold hardship, on low-income and middle-income families. The majority

81. Since 1940, the central city ("Federal City") area has lost one-third of its population. Row houses have been replaced with new highways and parking lots. The city's housing shortage is desperate. More than 60 percent of the central business district is now devoted to highways and off-street storage of motor vehicles.

Throughout the District, 30 percent of the land area is preempted by highways, while only 35 percent is privately owned, tax yielding property. The sprawl generated by past highway construction led to the loss, between 1948 and 1963, of one-fourth of the city's retail establishments. By 1960, over 44 percent of the city's wage earners resided and paid taxes outside of the city.

In return for its investment, the city has received increased smog, more traffic fatalities, a drastic loss of patronage in its public transit system, an ever-worsening housing crisis, and permanent scars on residential neighborhoods and monumental areas where older highways have been widened or new highways forced through to make room for more auto commuters.

Report, together with Minority Views, of the Committee on Public Works, House of Representatives, to accompany H.R. 17134, 90th Cong., 2d Sess., House Report No. 1584, p. 57.

of these families will be nonwhite, and the difficulties they would have in obtaining substitute housing are well known.

The District does not provide any facilities for relocation of these people. Public housing in the District has no room for them, if they are eligible, since there already is a waiting list of many thousands of families. The relocation assistance provided in H.R. 17134 will not solve the housing shortage or make the refugees from Washington's freeways more welcome in the suburbs. These meager bounties cannot begin to pay the highways' cost to the people of the District in dislocation of their lives and destruction of their urban values.[82]

Whether such pessimism about the bill which became the 1968 Act will prove justified remains to be seen. The point, however, is that the evidence before Congress generated serious doubts among many legislators as to whether the relocation provisions of the Act, assuming they would be enforced, were sufficient to protect, not just displacees, but the cities of the Nation.

Of all cities in the United States, the negative effects of highway displacement may be potentially most disastrous in Charleston. Although 1970 census figures show that thirty-three states have greater populations than West Virginia,[83] it was reliably estimated that only eight states had more residential displacements caused by the construction of federal-aid highways during a three-year period just ended.[84] Moreover, Charleston, which is one of the areas in

82. *Ibid.*, p. 58.

83. U.S. Dept. of Commerce, *Commerce Today*, Table "1970 Preliminary Population Count", October 19, 1970, p. 25.

84. *Highway Relocation Assistant Study, supra*, n. 5, Table 6, p. 42. The only states which had more residential displacements are California, Indiana, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsylvania. *Ibid.*

the state where the number of displacements is likely to be greatest, has been in the throes of a housing crisis for some time. For example, according to 1960 figures, 48 percent of all housing units in Charleston were in "poverty areas"; 83 percent of such housing consisted of "substandard units" and 69 percent was "overcrowded".[85]

The national urban crisis, exemplified in Charleston, is in no small part compounded of the fact that urban programs have unindlessly ignored the broad problems they create by focusing only on the frequently narrow ones they were designed to cure. In this manner the federal-aid highway program has in the past magnified a national housing problem to an extent unjustified by the production of additional and relatively unnecessary highways. Congress intended to rectify this situation by enactment of the 1968 Act; and in view of the magnitude of the problem which Congress perceived, it clearly intended that the relocation provisions of the Act were to apply to projects where, as in Charleston, displacees and the city might still benefit.

CONCLUSION

For the foregoing reasons, and for additional reasons set forth in the briefs of petitioners and in the dissenting opinion below, it is respectfully submitted that the judgment below should be reversed and the case remanded to the district court with instructions that further displacement be enjoined until respondents have prepared a relocation plan in accordance with law.

Respectfully submitted,

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85. Manvel, *Housing Conditions in Urban Poverty Areas*, report prepared for the National Commission on Urban Problems, Research Report No. 9 (Wash., D.C. 1968), Table 8, pp. 14-19 of 101 metropolitan areas in the United States with populations in 1960 of over 250,000, only 25 had worse figures than Charleston in this respect.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,
Petitioners,

—v.—

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,

Petitioners,

—v.—

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States District Court for the Southern District of West Virginia (App. 35a-59a),[1] is reported at 314 F. Supp. 20 (1969). The opinions of the United States Court of Appeals with the dissent of Judges Sobeloff and Winter from the denial of rehearing *en banc* (App. 65a-66a, 69a-78a) are reported at 429 F.2d 423 (1970).

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[1] The Single Appendix separately filed in this case is designated herein "App." The Appendix of statutes and regulations attached to this brief is designated "Br. App." Portions of the record not printed in the Appendix are referred to by their original exhibit number.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered May 14, 1970 and the petition for rehearing denied July 14, 1970. The petition for a writ of certiorari was filed in this Court on September 17, 1970, and granted on December 21, 1970. This Court's jurisdiction derives from 28 U.S.C. §1254(1).

Question Presented

Petitioners, residents of the black ghetto of Charleston, West Virginia, have been or will be displaced from their homes by the construction of a federally aided interstate highway. They are required to obtain new housing in a market from which they are excluded because of racial discrimination and a shortage of low cost housing. This case presents the fundamental constitutional question of whether the Fourteenth Amendment requires that when persons are removed from housing by state and federal action and thereby subjected to private housing discrimination, government officials must first make relocation housing available to them without regard to race or economic status.

Additionally, petitioners are among the class of persons protected by the amendments to the Federal-Aid Highway Act of 1968, 23 U.S.C. §501 et seq., which requires adequate assurances of relocation housing prior to their displacement by highway construction. Relying on a subsequently amended regulation, the United States Department of Transportation and the State Road Commission refused to provide such assurances, and the district court denied relief. The Court of Appeals affirmed, notwithstanding an intervening change in the regulations sustaining petitioners' position.

Under these circumstances, and especially where a precise statutory remedy is available to cure a constitutional wrong, are petitioners entitled to the relief the Constitution requires and Congress has provided, but which neither the administrative agencies nor the lower courts have afforded to them?

Constitutional, Statutory, and Regulatory Provisions Involved

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves various provisions of Title 23 of the United States Code (Highways), in particular, former §133 (repealed effective July 1, 1970, Pub. L. 90-495, §37, Aug. 23, 1968, 82 Stat. 836) (Br. App. 1-2); Pub. L. 89-574, §12, Sept. 13, 1966, 80 Stat. 770 (Br. App. 2-3); the Federal-Aid Highway Act of 1968, 23 U.S.C. §501, et seq. (Br. App. 4-13); the Federal-Aid Highway Act of 1970, Pub. L. 91-605, §117 (Br. App. 13-15); and the Fair Housing Act of 1968, 42 U.S.C. §3601 et seq., particularly §3608 (Br. App. 16).

This case also involves the following regulations and policy directives issued by the Department of Transportation:

(1) Circular Memorandum, January 23, 1968 (Pl. Ex. No. 9, App. 79a-81a).

(2) Instructional Memorandum, 80-1-68, ¶¶1; 2; 3; 4; 5; 6; 7; 9a, c, and g; 11; 12; 13; and 17c, f, g, and h; September 5, 1968, as amended (Br. App. 17-36).

(3) Circular Memorandum, December 26, 1968 (Br. App. 37-38).

(4) Circular Memorandum, February 12, 1969 (Br. App. 39-40).

(5) Memorandum on Implementation of Replacement Housing Policy issued by Secretary of Transportation John A. Volpe, January 15, 1970 (Br. App. 41-42).

(6) Circular Memorandum, March 27, 1970, as amended, April 10, 1970 (Br. App. 43-44).

(7) Memorandum of Under Secretary of Transportation James M. Beggs, issued November 6, 1970 (Br. App. 45-46).

Statement

Introduction.

This action involves the right, under the Constitution and federal statutes and regulations, of persons who are displaced by the construction of a federal highway to be relocated by the responsible state and federal agencies into decent, safe, and sanitary housing. The case arises in the context of a highway, to be built through the Triangle section of Charleston, West Virginia. In the Federal-Aid Highway Act of 1968, Congress addressed itself to the serious problems of persons whose homes were destroyed by highways in finding new housing. Sections 502 and 508 require the Secretary of Transportation and the states to develop, enforce and implement relocation plans which would in fact result in the availability of adequate housing for displacees. 23 U.S.C. §502, 508.

Thus, the central statutory issue in this case is whether the 1968 Act and regulations promulgated under it by the Department of Transportation impose obligations towards persons faced with displacement after its enactment by a highway project commenced before its enactment. In addition, this case raises a broader constitutional issue: the right under the Fifth and Fourteenth Amendments of black and poor white persons to assured relocation housing when forced by highway construction to seek new homes

in a housing market restricted because of racial discrimination and high prices.

The following statement will be divided into two main parts. The first will describe the factual setting of the case, i.e. the history of the I-77 highway project, its relationship to the statutes and administrative regulations, and the problem of finding adequate relocation housing in Charleston, West Virginia, as it relates particularly to the situation of people who are poor and black. The second will detail the proceedings in the courts below. As this case requires a somewhat detailed description of the history of Interstate Highway 77 and its relationship to the events in this lawsuit and relevant statutes and regulations, we have set out in the margin a table outlining the sequence of events with which we are concerned.[2]

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[2] The following are the dates of the pertinent events involved in this case:

1. August 31, 1964: Present route of I-77 approved by Federal Bureau of Public Roads.

2. April, 1966-May, 1967: Federal authorization to acquire land on highway right-of-way given.

3. August 23, 1968: Enactment and effective date of 1968 Federal-Aid Highway Act.

4. September 5, 1968: Issuance of implementing regulations by the Department of Transportation (IM 80-1-68).

5. December 3, 1968: Present suit filed.

6. April 2-3, 1969: Hearing in the District Court.

7. July 18, 1969: Order entered dismissing complaint.

8. Fall, 1969: Federal authorization for construction of I-77.

9. January 15, 1970, and March 27, 1970: Issuance of new relocation requirements by the Department of Transportation.

10. May 14, 1970: Opinion of Fourth Circuit Affirming Dismissal.

11. July 10, 1970: Federal order halting work on I-77 pending reconsideration of route.

12. July 14, 1970: Denial of Rehearing *en banc*.

13. November 6, 1970: Federal authorization to proceed with construction issued.

14. December 21, 1970: Certiorari granted.

A. Summary of Facts.

1. *Charleston, West Virginia, and the Triangle.*

Charleston, the capital and largest city of West Virginia, lies in a narrow valley, along the Kanawha River, and is bisected on the east by the Elk River, which joins the Kanawha near the center of the city. Because the hills rise steeply from both river valleys, there is a "sparsity of flat land" in the city for any type of development.[3]

The Triangle district, located along the south side of the Elk near its mouth, is the oldest and largest predominantly Negro community in the state. Many of its residents are elderly; almost all have comparatively low incomes.[4]

Urban housing shortage, common in many cities, is particularly severe in Charleston, partly because many homes have been demolished for public projects.[5] The impact in

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[3] App. 421a; 419a.

[4] In 1966, the average annual household income for blacks in the city was more than $3000 below the average income of white households, a fact resulting largely from job discrimination (Pl. Ex. No. 14, p. I-D-6.) The district court took note of this fact. App. 36a, 314 F. Supp. at 21.

[5] From 1960 to 1966 approximately 1900 low cost housing units were destroyed, while in the same period the only low cost housing constructed has been 100 units of public housing for the elderly, while 1500 middle to upper income units were privately constructed. App. 300a.

In 1966, a study prepared for an urban renewal program estimated that total displacements to be caused by public projects in Charleston would be:

Highway Construction	1094
Urban Renewal	755
State Capital Expansion	280
Disaster, Condemnation and Conversion	750
Total	2879

Pl. Ex. No. 14, p. I-D-14. These figures represent family units, and thus the total number of persons is far greater. The planned urban renewal project was postponed.

the Triangle is even more severe. Land clearance for a proposed expansion of a local water company, east of the highway route, displaced 243 persons a few years ago.[6] The planned highway will remove the homes of about 300 more. The proposed urban renewal project, which has been postponed indefinitely, largely because of the lack of replacement housing, will, when added, displace almost all of the district's 2000 residents.[7]

Housing discrimination exacerbates the effect of this situation on black citizens.[8] Private discrimination has concentrated Negroes in only a few areas of the city; the Triangle is the largest.[9] As a result, black persons do not have the same opportunities for finding relocation housing in the private sector as whites.[10]

This situation was recognized by the federal highway officials in studies of relocation problems made in early 1968, before dislocation had begun. The division right-of-way officer reported on February 20, 1968:

> . . . [O]ur major area of concern lies with those people who have income over and above that which would qualify them for public housing and desire to rent. More specifically, this area would be defined as families, with average annual incomes of from $5000

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[6] Def. Ritchie Ex. No. 1; App. 100a.

[7] *Ibid.;* Pl. Ex. No. 14, 16, 24.

[8] This, of course, is in addition to the difficulties arising from the lower incomes of blacks. See N. 4, *supra.*

[9] Pl. Ex. No. 23.

[10] App. 304a-306a; 331a-338a; Pl. Ex. No. 25.

A community worker who made a survey of fifty homes listed as available for relocation by the State Road Commission found that of those available and within the financial capability of Triangle residents, only eight would rent to Negroes. App. 332-335a; Pl. Ex. No. 25.

> to $7500 a year and who do not want to, or cannot, buy their own home. Urban renewal and public housing is of little value to our relocation problem in these cases, and *I have reason to believe that the private housing market is about saturated presently.*[11]

He underscored his concerns again on February 26, 1968:

> It appears that the relocation problem in the Charleston area, insofar as the State Road Commission is concerned, could become critical in the not too distant future due primarily to the apparent lack of rental property in the $60-$90 per month price range. The available replacement housing in this area is being depleted and no new sources are available at this time.[12]

Less than 10 days later, on March 6, 1968, after meeting with State Road Commission, Federal Housing Administration and Urban Renewal officials, the division right-of-way officer again expressed alarm that the housing market was being depleted:

> It appears that the Federal Housing Administration programs will provide the only source of replacement housing in the area. The existing private market, particularly in low to moderate priced rentals, is being depleted primarily by Interstate acquisition. It also appears that future authorization for acquisition will be affected unless the Federal Housing Administration programs are instituted in the very near future.[13]

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[12] Pl. Ex. No. 12, App. 93a.

[11] Pl. Ex. No. 12, App. 87a (Emphasis added).

[13] Pl. Ex. No. 12, App. 97a-98a. The urban renewal program then contemplated was not approved, with the result that the additional housing it would provide never came into being.

At trial, the division engineer was asked whether the facts described in the right-of-way officer's February and March, 1968 evaluations had changed during the year. The only change he could cite was the availability of rent supplements, provided for under 23 U.S.C. §506(b).[14]

2. *I-77 and the Highway Approval Process.*

The section of I-77 at issue here is part of the interstate highway system.[15] Routes 64 from the west and 77 and 79 from the north meet on the north bank of the Elk River, crossing southeasterly through the Triangle and the rest of the city as I-77.[16] While several alternative routes were originally considered, at least one of which would have avoided heavily populated areas,[17] the state proposed the

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[14] App. 424a-427a. He emphasized this by saying: "I'm not at all sure they could have gone through with the relocation program in the area . . . without these rental supplements." App. 427a. He was unable to say what relief would be available when the rent supplements, which have a statutory limit of two years, expired for families placed in housing more expensive than they could afford. App. 428a.

[15] The responsible federal agency is the Department of Transportation (DOT), acting through the Federal Highway Administration and the Bureau of Public Roads. Most of the operative work is carried on by state agencies, in this case the West Virginia Department of Highways (formerly the State Road Commission of West Virginia). The governing federal statute is Title 23 of the United States Code. The regulations in part are in 23 C.F.R., but are primarily found in various types of memoranda (instructional, policy and procedure, or circular) issued by DOT.

The process by which these interstate roads are built involves both state and federal agencies. The federal government finances 90% of the cost of an interstate highway, while the planning and construction of highways are state responsibilities. The states choose the system of routes for development, select and plan the individual projects to be built, acquire rights-of-way, and supervise the construction contracts. Thus, the federal agencies finance the road building, and exercise a veto power over the state's activities.

[16] App. 41a, 314 F. Supp. at 24; App. 109a, Def. Ritchie Ex. No. 1.

[17] App. 421a.

present route in 1964, and it was approved by the Bureau of Public Roads on August 31, 1964.[18] Federal authorization for right-of-way acquisition was given between April, 1966, and May, 1967.[19] *As of the effective date of the relocation amendments to the Federal-Aid Highway Act, 23 U.S.C. §501 et seq., and indeed, at the time of trial in this case, the final step in the approval process, authorization of construction, had not yet been given.*[20] Under that statute, the Secretary is obliged to require "satisfactory assurances" of the availability of adequate relocation housing before he may approve projects under 23 U.S.C. §106.[21]

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[18] App. 41a-42a, 314 F. Supp. at 24. On July 10, 1970, as a result of a public demonstration, a resolution by the City Council and a recommendation by James D. Braman, Assistant Secretary of Transportation for Environment and Urban Systems, all advocating a shift of the route one block east into land previously cleared by the water company but not being used, in order to lessen the impact on the residents, Secretary of Transportation John A. Volpe ordered work on the road to cease, while the route was reconsidered. New York Times, July 13, 1970, p. 62, col. 1. On November 12, 1970, Undersecretary of Transportation John M. Beggs announced that the route was reaffirmed, and authorized construction to proceed. Br. App. 45-46; Charleston (W. Va.) Gazette, November 13, 1970, p. 1.

[19] App. 42a-43a; 314 F. Supp. at 24.

[20] App. 132a-137a.

[21] In the past, "plans, specifications and estimates" were required for actual construction only, since costs of acquiring right of way were ineligible for federal contributions. 42 Stat. 212. Thereafter, when acquisition costs became eligible for federal contribution, 50 Stat. 838, the submission and approval of plans, specifications and estimates were administratively divided into two major stages: the right of way acquisition stage and the construction stage. *DOT Policy and Procedure Memorandum 21-5.* (Hereinafter "PPM.") Right of way *clearance* is considered part of the construction stage. *PPM 21-12.* Following the approval of plans, specifications and estimates for a given stage, federal and state highway officials enter into project agreements limited to such stage. *PPM 21-7.* The approval of the construction stage is the final approval given by the DOT.

In the Triangle district itself, only 9 of the 65 parcels to be acquired had been optioned to the State Road Commission prior to August 23, 1968, the effective date of the 1968 relocation amendments. Between then and the time of trial, April 2, 1969, nine additional parcels had been optioned and one condemnation action had begun.[21a] As of February 28, 1969, shortly before trial, only 17 households had been moved and some 282 persons remained to be dislocated.[21b] At the time the appeal was argued before the Court of Appeals in May, 1970, petitioners counted 262 persons remaining in the right-of-way. Following the Court of Appeals' affirmance, displacement accelerated and, by July, when the petition for rehearing was denied, 189 persons (150 by federal defendants' count) remained. A survey taken by petitioners on December 22, 1970, indicated that 65 persons and 14 businesses had not yet been moved. The state respondents assert that on January 28, 1971, 35 individuals and 5 businesses remain.[22]

3. *The 1968 Relocation Amendments to the Federal-Aid Highway Act and the Administrative Regulations to Implement Them.*

Prior to 1962, there was no provision to grant assistance to persons displaced by federally aided highway construction, beyond the right they might have under state law relating to condemnation by public agencies. In that year, Congress enacted 23 U.S.C. §133, requiring the states to provide "relocation advisory assistance" to dislocatees and authorizing relocation payments to cover moving expenses,

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[21a] Pl. Ex. No. 4.

[21b] *Ibid.*; Def. Ritchie Ex. No. 1, App. 99a-101a.

[22] Response of Respondents Ritchie, et al. to application for injunction filed in this Court January 30, 1971.

where "authorized by State law." Several studies[23] showed these provisions to be inadequate, as highway officials were not obliged to curtail their displacement activities even if they knew that relocation resources were not available.[24] Congress responded to the deficiency in the Federal-Aid Highway Act of 1968. The new law not only required the payment of a variety of relocation allowances, which the states were obliged to permit no later than July 1, 1970, 23 U.S.C. §§505-507, but also a program which assures the actual availability of adequate relocation housing for displaced persons, 23 U.S.C. §502 and §508.[25] Section 502 requires the Secretary of Transportation to police the adequacy of state relocation programs, and prohibits him from approving any project unless he receives "satisfactory assurances" that relocation assistance and adequate relocation housing are available. Section 508 requires the state to ascertain the relocation needs of those to be displaced and to assure that an adequate amount of satisfactory relocation housing is available.

Under the rule making authority authorized by the statute, 23 U.S.C. §510(b), the Secretary has undertaken to define the statutory term "satisfactory assurances." Instructional Memorandum (IM) 80-1-68 issued September 5,

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[23] See *infra* at Br. App. 48-50.

[24] The regulations under section 133 required state highway departments to compile information about available public and private housing opportunities. PPM 80-5(3)(f) 4 and 5.

[25] The Act was specifically made effective on the date of its enactment, August 23, 1968, except to the extent that states were unable to comply because of local law, and fully applicable on July 1, 1970. Pub. L. 90-495, §37, set out as note under 23 U.S.C. §502.

West Virginia amended its laws to permit full compliance on March 7, 1969, prior to the hearing in the District Court. W. Va. Code Ch. 17, Art. 2A, Sec. 20.

1968,[26] sets out in detail what is required. The key requirement is that state highway departments prepare relocation plans presenting relevant factual data pertaining to relocation housing problems and their solutions, which must be approved by federal officials prior to right of way acquisition and/or construction.[27] The federal officer must then review the plan to determine whether it "is realistic and is adequate to provide orderly, timely and efficient relocation of displaced individuals and families" to satisfactory housing available without regard to race "with minimum hardship on those affected." [28]

A Circular Memorandum (CM) issued by the Bureau of Public Roads on February 12, 1969, shortly before the trial in this case, stated that the state should undertake the planning required by IM-80-1-68 "on all active projects to the extent that it is reasonable and proper," and that to determine this, the local federal officials should review each project to determine the extent of dislocation remaining, and to require the planning information where "a substantial number of persons remain to be relocated." [29]

While this case was pending before the Court of Appeals, new relocation instructions were issued by DOT. These were ordered by the Court to be filed as part of the record, one month prior to argument.[30] The changes were ordered by Secretary Volpe in a memorandum issued January 15, 1970, requiring: "Specific written assurances that adequate replacement housing will be available or provided for" before approval of all projects and that construction

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[26] As amended, Br. App. 17-36.

[27] IM 80-1-68, ¶7, Br. App. 25-27.

[28] *Id.* ¶5a(5), Br. App. 21.

[29] Br. App. 39-40.

[30] App. 63a-64a; see also App. 77a, 429 F.2d at 426.

"be authorized only upon verification that replacement housing is in place and has been made available to all affected persons." [31] The Federal Highway Administration implemented this on March 27, 1970, in a memorandum applicable to all projects authorized after May 1, 1970, and to all previously authorized projects on which persons were not yet displaced on that date, and requiring that federal officials "shall not authorize any phase of construction . . . which would require the displacement of individuals or families", or permit any other dislocation until the person has obtained for himself or has been offered by the state adequate replacement housing immediately available.[32] In affirming the district court's judgment, the Court of Appeals made no reference to the existence or impact of these new requirements.[33]

4. *The Relocation "Program" in the Triangle.*

Prior to the relocation amendments, and on the basis of the DOT study on relocation which had been submitted to Congress, the Director of Public Roads issued a memorandum on January 23, 1968, to his regional and state administrators directing that relocation problems be studied and considered more intensively.[34] Specifically noting that legislation was not needed to implement certain aspects of the study, he stated that "the relocation plan concept should be implemented particularly in an urban area where there is a large number of families and businesses to be dislocated." [35]

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[31] Br. App. 41-42.

[32] Br. App. 43-44.

[33] *Cf.* App. 76a-77a, 429 F.2d at 425-426, Sobeloff and Winter, JJ., dissenting from denial of rehearing *en banc*, and discussion *infra* at 19-20, 35-37.

[34] CM January 23, 1968, App. 79a-81a (Pl. Ex. No. 9.)

[35] *Id.* at 80a-81a.

Studies made by the federal officials in response to this directive indicated that relocation housing in Charleston was in fact inadequate to meet the needs of highway displacees.[36] Although the federal division engineer concluded on March 25, 1968, that the State had not satisfactorily dealt with this problem,[37] no remedial action was required.[38] It was considered sufficient to rely on general assurances and evidence from past performance.[39]

Solely in response to this lawsuit,[40] the State Road Commission prepared a so-called "relocation plan" for the Triangle.[41] Although the federal officials requested and obtained a copy of it, they made no attempt to review it, as the regulations require.[42]

The plan establishes that the overwhelming majority of Triangle residents are tenants and are poor, with aver-

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[36] See *supra* pp. 6-9.

[37] He wrote:

> In the Charleston area the State did secure valuable information relative to persons to be dislocated by a survey which was a valuable assist in defining the overall problem involved. It would not be considered, in our opinion, a complete relocation plan since it did not provide information either factual, estimated or projected as to the availability of replacement housing.

Pl. Ex. No. 9, App. 83a. See also App. 167a-168a.

[38] App. 168a.

[39] App. 150a-151a; 198a-199a; 226a-227a; 384a-386a; 415a-416a.

[40] App. 386a.

[41] Def. Ritchie Ex. No. 1; App. 99a-126a.

[42] IM 80-1-68, ¶7b.

The right-of-way officer stated, "I have not had occasion to review it in any depth. . . . I have seen it. That's about all." App. 209a. See App. 407a-408a.

age rentals about half those in the city as a whole.[43] While containing voluminous but misleading statistics about public housing in the city,[44] it only asserted vaguely that the majority of displacees in the Triangle "appear to be eligible for public housing."[45] It contains no information regarding the effects of racial discrimination on the availability of housing.[46] *Most important, the plan treats the Triangle in isolation, and makes no attempt to consider the competing and simultaneous needs of the several hundred persons outside the Triangle who would be displaced by the same highway nor those who would lose their homes from other causes.* State Road Commission officials did not consider competition to be relevant.[47] As recognized by the Department of Transportation in its regulations,[48] competition for

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[43] App. 101a.

[44] The plan relies on the "turnover" rate in public housing, a standard discredited in relocation planning, does not consider the needs of other highway displacees from outside the Triangle, and makes no finding that residents are indeed eligible under housing authority requirements. See *infra* at 47-50.

[45] App. 102a.

[46] The state officers relied on the Charleston fair housing ordinance to support their view that discrimination was not a factor. The ordinance, however, does not cover two or three family units or four family owner occupied units. App. 392a. A survey taken by a community worker of the housing on a list furnished by the Road Commission to displacees, showed that over half had been already rented, and that only eight of those remaining were available to blacks. App. 332a-334a; Pl. Ex. No. 25.

[47] App. 395a.

[48] IM 80-1-68 ¶7b(3)-(b)e(c) Br. App. 27.

available units is obviously highly relevant in relocation planning.[49]

B. Summary of Proceedings in the Courts Below.

This action was filed in the United States District Court for the Southern District of West Virginia on December 3, 1968, three and one-half months after the enactment of the relocation amendments to the Federal-Aid Highway Act, as a class action on behalf of all persons living in the interstate corridor in the Triangle and threatened with displacement by the highway.[50] It challenges the failure of federal

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[49] Petitioners have deliberately confined their discussion of the facts to those in the record as developed at trial and as presented to the Court of Appeals. They are aware of the data relating to relocation that has been presented to this Court by the state in its response to petitioners' motion for a stay injunction. They urge, however, that this data not be considered here in deciding the case in chief for a number of reasons.

Clearly, most, but not all, of the Triangle residents have been uprooted and relocated someplace. But this Court does not sit as a trial court to make findings regarding the factual dispute in this case, *viz.*, whether people have been relocated to decent, safe, and sanitary housing as required by federal statute. It surely cannot make such findings on the basis of *ex parte* and self-serving presentations by one of the parties.

With regard to the constitutional issue, the fact that persons have been relocated somewhere does not mean they have been relocated on a racially nondiscriminatory basis. Placing blacks into one ghetto from another does not satisfy the dictates of the Fourteenth Amendment, or federal law. *Shannon* v. *Dept. of Housing and Urban Development*, —— F.2d —— (3rd Cir. Dec. 30, 1970, No. 18397.) The factual questions of how people were moved and to where should be resolved by the district court on remand after decision by this Court of the legal issues presented by petitioners and according to valid standards and procedures.

[50] Plaintiff-petitioners Keith Kincaid, Tennis Hogans, Robert Bayes, Katie Dean, Sedalia Hayes and Lillian Day were all residents of the corridor at the time the action was filed. The last named, Lillian Day, is white, and represents the interests of low-income white displacees. They are joined by the Triangle Improvement Council, an organization representing the Triangle community, and its officers.

and state officials to assure, in accordance with the relocation housing requirements of the 1968 amendments and the equal protection clause of the Fourteenth Amendment, the availability of relocation housing on a non-discriminatory basis for persons evicted from their homes by highway construction.[51] The defendant-respondents are the federal and state officials responsible for the construction of the highway.[52]

To prepare for trial, plaintiffs sought discovery of pertinent administrative documents from the agencies. The district court refused to permit any discovery.[53] Following the hearing on plaintiffs' motion for a preliminary injunction, the case was submitted on the merits.

In its opinion, the court ruled preliminarily that the defendants' objections to reviewability and standing were not well founded, as the Administrative Procedure Act, 5 U.S.C. §701 et seq. authorized judicial review, and the plaintiffs were "persons affected" by the agency's actions.[54] On the merits, however, it dismissed, accepting the defendants'

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[51] The complaint (App. 9a-21a) also challenged the adequacy of public hearings on the highway route and the failure of federal and state highway officials to consider the adverse social effects of the highway as required by 23 U.S.C. §128. Prior to the hearing on the motion for a preliminary injunction, the district court limited petitioners' proof to the problem of relocation housing (App. 27a; 39a-40a, 44a-45a; 314 F. Supp. at 22, 23, 25.) This limitation on petitioners' proof, in effect a partial summary judgment made without any proceedings to determine whether triable issues of fact existed, was not appealed.

[52] The City of Charleston and its officials were also named as defendants because of their involvement in various programs affecting housing. Although they participated in the trial, they did not appear in the Court of Appeals, and have not yet participated in the proceedings in this Court.

[53] App. 38a-39a; 314 F. Supp. at 22-23.

[54] App. 46a-49a; 314 F. Supp. at 26-28.

interpretation of the statute, suggested by paragraph 5b of IM 80-1-68, that the requirements for "satisfactory assurances" of relocation housing, and particularly for a relocation plan, do not apply to projects, like this one, where authority to acquire right-of-way preceded the 1968 Act. Without discussing in any detail petitioners' contention that this interpretation undermined the clear intent of Congress, the court held that it had a rational basis, and should not be disturbed, relying on *Udall* v. *Tallman,* 380 U.S. 1 (1965). Finally, although the federal agencies had contended they were not obliged, in this circumstance, to review the adequacy of relocation housing, the court undertook independently to make that determination. On the basis of assurances that the relocation requirements would be met, it "assume[d] that the highway officials gave these assurances in good faith," and found that "adequate relocation housing, on an open racial basis, will be available in Charleston for an orderly relocation of the displacees from the interstate corridor." [55] Apparently from the testimony relating to the relocation plan prepared for the litigation, and the plan itself,[56] it found "that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area." [57] On the basis of these findings, it dismissed the constitutional claim, holding that there was no racial discrimination in the provision of relocation housing to Negroes.

While the appeal was pending in the Fourth Circuit, the Department of Transportation issued memoranda on relocation policy which altered the requirements of the earlier

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[55] App. 56a-57a; 314 F. Supp. at 30-31.

[56] See *supra* at 15-17.

[57] App. 57a; 314 F. Supp. at 31.

regulations and went far toward accepting petitioners' interpretation of the Act. These documents[58] were ordered to be filed as part of the record on appeal.[59] Despite this fact, and petitioners' supplemental brief and oral argument which discussed them, the court made no reference to them in its one sentence affirmance "on the opinion of the district court." [60]

In their petition for rehearing with a suggestion for rehearing *en banc*, petitioners asserted that the district court's opinion could not properly be affirmed in light of the change in the Department's view of the law, since the lower court's ruling had specifically been based on the prior administrative interpretation, relying principally on this Court's opinion in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). Rehearing was denied, again without explanation.[61] A dissenting opinion by Judge Sobeloff, joined by Judge Winter, did suggest the reasoning of the Court and the majority.[62]

SUMMARY OF ARGUMENT

I

The record in this case reveals both racial discrimination and a shortage of low cost housing in the Charleston housing market. State and federal action which displaces black and poor persons into such a market constitutes a violation of the Fifth and Fourteenth Amendments, since it results

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[58] See *supra* at 13-14.

[59] App. 63a-64a.

[60] App. 65a-66a; 429 F.2d 423.

[61] App. 71a; 429 F.2d at 423.

[62] App. 72a-78a; 429 F.2d at 423-426. See *infra* at 35-37.

in a denial of equal protection through the combination of state and private action. This position is supported by decisions of this Court as well as those of lower federal courts in directly analogous circumstances (24-26).

II

A. A constitutional determination is not, however, necessary to the decision of this case, as Congress has provided a statutory remedy to insure that all persons displaced by federally-aided highway construction are provided with adequate replacement housing, in the relocation provisions of the 1968 Federal-Aid Highway Act. The language of the statute and its legislative history indicate clearly that Congress intended it to be fully effective immediately. Any interpretation delaying its effectiveness or diluting its benefits conflicts with Congressional intent (27-30).

By regulation, the Department of Transportation has implemented the statute by requiring comprehensive relocation planning in order to determine before displacement the needs of those whose homes will be destroyed and the resources available to meet those needs. By a technical restriction contained in its own regulation, the Department determined that such planning was not required in the Triangle because authority to acquire right-of-way had been given before the effective date of the statute, although only a small number of persons had actually moved before that date. The district court accepted this limitation as valid, although it conflicts with the legislation it purports to enforce, and indeed with other portions of the same regulation (30-35).

While this case was pending in the Court of Appeals, the Department issued new relocation guidelines which substantially modified the previous limitations and partially

adopted petitioners' interpretation of the statute. The Court of Appeals erred in failing to take note of the impact of this change in the law. *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). Those guidelines do not, however, yet fully implement the statute (35-37).

B. Insofar as they did purport to require assurances of adequate relocation housing for petitioners, the state and federal officials failed to comply with procedures mandated by law, relying solely on vague and unsupported assertions. Where an agency is effectively given the task of policing itself, in possible conflict with its primary function of building roads, has no internal review procedures for persons aggrieved by its actions, and has demonstrated impatience with those who question its conduct, a reviewing court should carefully scrutinize the administrative procedures. The district court erred in failing to review the entire record to determine whether the agency's conclusion was in fact supported by substantial evidence, and in relying instead on vague tests and oral assurances made during trial, which had no factual underpinning. Moreover, in making the ultimate factual determination itself the court usurped what should properly be an administrative function (38-46).

The district court's finding that relocation housing in Charleston was adequate to meet the needs of petitioners, in addition to being improperly made, is clearly erroneous. The court did not require the agencies to supply the information necessary to support that conclusion, and the bulk of the evidence which was presented contradicts it. The finding that public housing alone would be ample fails to consider the factors of competing displacement, and actual eligibility for public housing, and erroneously determines the availability of such housing (46-49).

III

A remedy should be afforded to petitioners which will insure that all those who are entitled to the protections of the 1968 relocation amendments, both those who are yet to be moved and those who have been displaced into demonstrably inadequate housing, are afforded the benefits which Congress intended them to have (50-52).

ARGUMENT

I

The Displacement of the Black Petitioners Into a Racially Discriminatory Housing Market Without Adequate Governmental Measures to Assure Non-Discriminatory Relocation Housing Deprives Them of the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment.

As the record in this case demonstrates, construction of I-77 through the Charleston Triangle has had and will have the effect of displacing black and poor residents of the area and throwing them into a highly constricted, racially discriminatory housing market.

We may assume *arguendo*, that the discrimination of the housing market represents private decision making to exclude Negroes from areas reserved for whites, and poor persons from those reserved for the more wealthy, and not state action at the point of purchase and rental.[62] Nevertheless, it is state action which has uprooted the black and poor plaintiffs by destroying their homes, and placed them at the mercy of the racial discrimination and high prices in such housing as remains in Charleston.

Such governmental action, we submit, violates the Fifth and Fourteenth Amendments to the United States Constitution, although at the point of impact, private action is also present. While "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations

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[62] Insofar as the discrimination is based on race, it is of course prohibited by federal law. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

has been found to have become involved in it," *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), *Turner* v. *City of Memphis*, 369 U.S. 350 (1962), the State and federal governments here are significant moving forces.

The question is not novel. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968) holds that governmental relocation which puts minorities at the mercy of discrimination in the housing market violates the equal protection clause:

> What plaintiffs' complaint alleges, in substance, is that in planning and implementing the Project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree.

Id. at 930. The court also made clear the importance of recognizing the realities of private discrimination:

> It is no secret that in the present state of our society discrimination in the housing market means that a change for the worse is generally more likely for members of minority races than for other displacees. This means that in many cases the relocation standard will be easier to meet for white than for non-white displacees.

Id. at 931. Similarly in *Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969), where state action was involved

in the destruction of the homes of Negroes by a private builder, "the fact that the decision to discriminate may be made by private individuals rather than a public official is not decisive," since, "the City may involve itself in the discriminatory operation of the private housing market." *Id.* at 692-93.

Such a view of the law is, of course, consonant with numerous other cases which find denial of equal protection of the law in a combination of governmental and private action, e.g. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), (court enforcement of privately agreed upon restrictive covenants); *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963) ("convictions cannot stand, even assuming . . . that the manager would have acted as he did independently of the existence of the ordinance"); *cf. Garner* v. *Louisiana*, 368 U.S. 157, 176 (1961) (Douglas, J., concurring); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).[44]

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[44] Additionally, the failure of the federal officials to take into consideration the discriminatory effects of their programs is a violation of the Fair Housing Act of 1968, which requires all executive departments to act "affirmatively" so as to further the national policy of fair housing. 42 U.S.C. §3608(e), Br. App. 16. See *Shannon* v. *Department of Housing and Urban Development*, —— F.2d —— (3d Cir., Dec. 30, 1970, No. 18397). Cf. *City of Chicago* v. *F.P.C.*, 385 F.2d 629, 635 (D.C. Cir. 1967):

> A regulatory agency may, should, and in some instances must, give consideration to objectives expressed by Congress in other legislation, assuming they can be related to the objectives of the statute administered by the agency.

II

The 1968 Relocation Amendments to the Federal-Aid Highway Act and Regulations Thereunder Grant Relocation Benefits to the Triangle Residents Which Have Not Yet Been Administratively or Judicially Accorded Them.

Petitioners have argued in I, *supra*, that reversal is required because the Triangle residents' rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated by the State's failure to provide an adequate relocation program, in which they would be free from private racial discrimination. But the Court need not reach this Constitutional question, since reversal is independently required by the 1968 Amendments to the Federal-Aid Highway Act and implementing regulations. While petitioners contend that the Federal Act and regulations clearly guarantee persons not yet displaced at the time of the Act's enactment an adequate relocation housing program, any ambiguity which may exist must be resolved by construing the Act and regulations so as to avoid the necessity for a constitutional adjudication.[65]

A. The 1968 Relocation Amendments Assure Persons Not Yet Displaced as of the Date of Enactment the Right to Adequate Replacement Housing, and Pursuant Thereto Mandate Detailed Relocation Plans.

The statutory language makes clear that the 1968 Relocation Amendments were intended to protect the rights of persons not yet displaced as of the time of enactment. Thus Congress did not, as it had in its first tentative

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[65] See, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

measure dealing with highway dislocation,[66] limit the applicability of the requirements to projects not yet approved. The Act was declared effective and fully operative on the date of its enactment.[67] Moreover, the statute defines the term "displaced person," the very individual which it seeks to protect, as:

> any person who moves from real property on or after the effective date of this chapter [August 23, 1968] as a result of the acquisition or reasonable expectation of acquisition of such property [for a Federal-Aid highway].[68]

This interpretation is supported by the legislative history.[69] The 1968 Relocation Amendments arose out of recognition that the federal highway program had previously been wholly deficient in affording protection to persons displaced and had therefore resulted in widespread disruption and misery, particularly in urban areas and among the poor and minority groups. Further, at the time the 1968 Relocation Amendments were enacted, 32,000 of the 41,000 miles of the entire interstate road system had been constructed or were under construction. Of the 9,000

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[66] 23 U.S.C. §133(e), Br. App. 2.

[67] Pub. L. 90-495 §37, Aug. 23, 1968, 82 Stat. 831. The one limiting feature in the act provides that until July 1, 1970, it "shall be applicable to a state only to the extent that such state is able under its laws to comply . . ." *Ibid.*

It should be emphasized that it has never been suggested in these proceedings that West Virginia law in any way prevented the state from complying fully with the requirements of the 1968 amendments. See n. 25 *supra*. Moreover, the Department has determined that these limitations apply only to relocation payments and not to the requirements that adequate relocation housing be available. C.M. December 26, 1968, Br. App. 37-38.

[68] 23 U.S.C. §511(3).

[69] A summary of the relevant legislative history appears at Br. App. 47-52.

remaining miles, 8,500 were in the phases of engineering design and right of way approval, but construction and actual displacement had not taken place, since these phases typically occur years later.[69a] Thus the main dislocation problem facing Congress and with which it presumably attempted to deal was posed by the vast numbers of persons scheduled to be displaced under highway projects already approved. Finally, the committee reports and floor debate relating to the 1968 Amendments reflect Congress' recognition of the urgency of dislocation problems and of the need to act immediately to remedy them.[69b] Any interpretation making the Act's protections inapplicable to persons to be displaced by projects which had already been approved would defeat the obvious intent of Congress.

The protections afforded by the 1968 Amendments are detailed in Section 502, which provides specifically that the Secretary "shall not" approve any project "which will cause the displacement of any person . . . unless he receives satisfactory assurances from the State highway department" that:

> . . . within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.[70]

[69a] 1968 U.S. Code Cong. & Adm. News. 3484.

[69b] See Br. App. 47-52.

[70] 23 U.S.C. §502(3); Br. App. 5.

This language clearly calls upon the Secretary to require the development by State officials of a program satisfactory to the Secretary which would guarantee relocation housing.[71]

In order to implement this provision, the Secretary of Transportation issued on September 5, 1968, a Memorandum entitled IM 80-1-68,[72] pursuant to his rule-making

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[71] The term "satisfactory assurances" in a closely related context appears first in section 305(a) of the Housing and Urban Development Act of 1965, Pub. L. 89-117, August 10, 1965, 79 Stat. 475; 42 U.S.C. §1455(c)(2) which mandates that as a condition of further assistance, "the Secretary [of Housing and Urban Development] shall require, within a reasonable time prior to actual displacement, satisfactory assurance by the local public agency" that satisfactory housing is available for all persons displaced. The House committee report on this section indicates that it was intended to "expand and implement the existing requirement that there be a feasible method for the temporary relocation" of urban renewal displacees. 1965 U.S. Code Cong. & Ad. News 2672; see also *id.* at 2645.

Cf. *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968) holding that the failure of the local agency to prepare and of the Secretary to review a relocation plan was a violation of the statute, and enjoining the proposed project until such a plan was submitted to the Secretary and approved by the court.

That Congress intended Section 502 to require the actual provision of relocation housing is also suggested by an amendment to the relocation provisions contained in the Federal-Aid Highway Act of 1970. Pub. L. 91-605 §117, Dec. 31, 1970, Br. App. 13-14. That section authorizes the Secretary to approve the cost of providing replacement housing for dislocatees where a highway project cannot proceed to construction "because replacement housing is not available and cannot otherwise be made available as *required* by section 502 of this title." (Emphasis added.)

[72] Br. App. 17-36.

Paragraph 2b(2) of the memorandum states that it is applicable to:

> All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

authority under the act.[73] Paragraph 7 of this memorandum specifically requires that the State highway department, "prior to proceeding with right-of-way negotiations *and/or* construction shall furnish" a relocation program plan for review and approval by the division engineer.[74]

The federal respondents suggested in their brief to the Court of Appeals that this language means that the requirements of the memorandum are applicable to previously authorized projects only if *no* persons had been displaced as of the effective date, and that since a small number of persons in the Triangle had moved before August 23, 1968, the requirements have no force here. Federal Appellees' brief at 21 N. 5. It is submitted that such an interpretation is not supported by the language, and is inconsistent with the legislative history of the 1968 Amendments, and with the statutory definition of a displaced person as "*any* person who moves from real property on or after the effective date of this chapter." This position is also in conflict with a circular memorandum issued February 12, 1969, which states that a relocation plan should be required on any project where a "substantial number of persons remain to be relocated." C.M. February 12, 1969, Br. App. 39-40.

[73] 23 U.S.C. §510; Br. App. 11.

[74] (Emphasis added.) Specifically, the State highway department is required to submit the following information for review and approval:

> (1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available . . . housing. . . .
>
> (2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons *without regard to race, color*. . . .
>
> (3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:
>
> (a) outline the various relocation problems disclosed by the above survey;
>
> (b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;
>
> (c) provide detailed information on *concurrent displacement* and relocation by other governmental agencies or private concerns;
>
> (d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees . . . (Emphasis added.) IM 80-1-68 ¶7, Br. App. 26-27.

Having issued IM 80-1-68 in order to implement Section 502, the Department of Transportation was not free to disregard its requirements.[75]

However, despite Section 502 and IM 80-1-68, no relocation plan whatsoever with respect to any I-77 project was ever required or prepared prior to this lawsuit. Further, the plan—limited to Triangle—which was prepared in response to the suit failed to meet the minimal requirements of the statute and implementing regulation.[76]

The district court held that no relocation plan or other detailed factual demonstration of the availability of relocation housing for the Triangle displacees was required under the law because authorization to acquire right-of-way on the projects in the Triangle had been given in 1966 and 1967.[77] The court relied on ¶5b of IM 80-1-68, which pro-

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[75] While . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural requirements, neither was he prohibited from doing so . . . and having done so, he could not, so long as the Regulations remained unchanged, proceed without regard to them. *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

The desirability of requiring relocation plans had been recognized by the Department of Transportation even prior to Section 502's enactment. The study prepared by the Department in response to the congressional mandate contained a recommendation that state highway departments be required to submit relocation plans for all projects in large urban areas. *Highway Relocation Assistance Study*, 90th Cong., 1st Sess. at 16-17, 90 (1967). Moreover, in a memorandum to his regional and local subordinates issued January 23, 1968, seven months before the enactment of the statute, the Director of Public Roads urged that relocation plans be required in urban areas where large numbers of persons would be dislocated. Pl. Ex. No. 9; App. 79a-81a.

[76] Def. Ritchie Ex. No. 1; App. 99a-126a.

[77] Significantly the court did not address itself to the meaning of Section 508 which imposes an independent obligation on the State to assure the availability of adequate replacement housing.

vides that state relocation assurances, which include the ¶7 plan, "are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum."

Petitioners contend that this ruling constituted reversible error under the statute and existing regulations.

The sentence of ¶5b relied on by the district court is essentially meaningless as written since wherever authorization to commence construction has been given, authorization to acquire a right-of-way must also have been given. The sentence would make sense if the "or" were changed to "and" so that it read "authorization to acquire right-of-way *and* to commence construction." That this may well have been the intention is supported by the following sentence of ¶5b which provides that the state "will pick up the sequence at whatever point it may be in the acquisition program" on the issuing date of the regulations. This would appear to require that where, as here, the construction phase of the acquisition program had not received federal authorization as of the date of issuance of IM 80-1-68, the relocation requirements of ¶7 were to apply. This interpretation of ¶5b is supported by other sections of that same regulation which indicate that the relocation protections are applicable where construction or displacement has not yet occurred.[78] Moreover, the court's interpretation

[78] Thus the regulation is made applicable to all projects authorized on or before August 23, 1970, on which persons "have not been displaced" (¶2b(2)), and requires that relocation plans be prepared "prior to proceeding with right-of-way negotiations *and/or* construction" (¶7b). (Emphasis added.) The *construction* phase of the projects here in issue had *not* been given approval on effective date of the statute or the regulation. App. 132a-137a. By regulation, right-of-way *clearance* is a part of the construction stage. DOT policy and Procedure Memorandum 21-12. No clearance had taken place in the Triangle by the effective date of the statute or regulation, nor indeed at the time of the trial seven months later.

of ¶5b conflicts with memoranda issued after IM 80-1-68 but before this trial which indicate the Department's recognition of its obligation under Section 502 and IM 80-1-68 to require relocation plans for persons not yet displaced regardless of when right-of-way acquisition or construction was approved.[79]

But even assuming that ¶5b was intended to permit the displacement of persons after the effective date of the 1968 Amendments without adequate relocation guarantees, as the District Court found, then it was in clear conflict with the statutory purpose and should have been declared null and void.

In upholding the restrictive interpretation of the statute contained in ¶5b, the District Court relied on *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965): "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or

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[79] A Circular Memorandum to regional DOT officials issued by the Bureau of Public Roads on December 26, 1968, provides:

> Under paragraph 7b(3) [of IM 80-1-68] the division engineer should insist that the State furnish an analysis of the relocation problems and possible solutions in *sufficient detail to enable him to determine the advisability of proceeding with the project* and to assure that no relocatee will be required to move unless there is satisfactory replacement housing available to him. CM, December 26, 1968; Br. App. 37-38 (Pl. Ex. No. 3) (Emphasis added).

A similar memorandum issued February 12, 1969, states that while all ¶7 assurances may not be called for where a "major portion of the relocations have previously been accomplished," the submission of the data required by ¶7b would be appropriate "if a substantial number of persons remain to be relocated," even on going projects. CM, February 12, 1969, Br. App. 39-40 (Pl. Ex. No. 3). The Federal highway officials in West Virginia failed to require the state to supply any additional information in compliance with these instructions from their superiors.

agency charged with its administration." [80] However, as was stated more recently in *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969), the "departmental construction of its own enabling legislation . . . is only one input in the interpretational equation," whose weight is limited when the agency construction was not known to Congress when the statute was considered, and which should be disregarded where it conflicts with Congressional intent.[81]

Whether or not the district court erred in ruling at the time of trial that the Department had no obligation to require and review a relocation plan with respect to persons not yet displaced on the effective date of the 1968 Amendments, there can be no question that regulations issued by the Department in April, 1970 while this case was pending on appeal, required reversal under *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969). These regulations specified that construction (defined to include clearance) should not be authorized until persons who would be displaced by it had been provided with adequate replacement housing.[82] While these regulations are inadequate in that they provide no relief for persons displaced prior to

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[80] App. 53a, 314 F. Supp. at 29.

[81] Accord, *Cy Ellis Raw Bar* v. *District of Columbia Redevelopment Land Agency*, 433 F.2d 543, 548, 550 (D.C. Cir. 1970).

[82] The first is a memorandum from the Secretary to his subordinates ordering that their policies require that construction be authorized "only upon verification that replacement housing is in place and has been made available to all affected persons." Br. App. 41-42. The second is a memorandum from the Right-of-Way Director of the Bureau of Public Roads to the Regional Administrators. Applicable to all projects authorized after May 1, 1970, and to all authorized before that date "on which individuals and families are still to be displaced," it provides:

> The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of

1970 in violation of Section 502's requirements, they at least make clear that comprehensive relocation plans were required before construction approval as the entire Court of Appeals apparently recognized.[83] The failure of the Court of Appeals to reverse on the basis of the intervening regulations was apparently grounded on the assumption that the Department's new policy would be applied to the Triangle and that petitioners' claims were thus mooted.[84] But as Judge Sobeloff points out in his dissent from the denial of rehearing *en banc*, this assumption was unwarranted since defendants had continued on the appeal to press their contention that no formal relocation plan was required despite the new regulations. And as Judge Sobeloff also noted, failure to reverse the district court's decision might well be interpreted as approval of that court's holding that no duty existed to provide an adequate relocation housing program (App. 78a; 429 F.2d at 426).

Indeed, the defendants have prepared no relocation plan, and to this date have resisted the requirement for an analysis (in accordance with the guidelines of the regulations) that would definitely test, either to corroborate or to contradict, their assertion that adequate housing exists.

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individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy. C.M. March 27, 1970, as amended, April 10, 1970, Br. App. 43-44.

[83] There is, of course, no dispute within the court that the appellants' [petitioners here] position on the applicability of the 1968 amendments has now become the law and that comprehensive relocation plans are required before construction can be approved.

App. 77a, 429 F.2d at 426. (Sobeloff, J., dissenting).

[84] See Judge Sobeloff's dissent from the denial of rehearing *en banc*, App. 77a-78a; 329 F.2d at 426.

While the April, 1970 regulations require reversal of the district court's ruling, reversal on this ground alone would be insufficient. First, as noted, the new regulations fail to provide any remedy for persons displaced prior to their issuance and, further, they do not specify the detailed requirements of an adequate relocation plan as does IM 80-1-68. Second, as was recently argued before this Court in another pending case,[85] and as the record in this case makes manifest, the Department of Transportation has shown little regard for its own policy statements as limits upon or guides to its actions.[86]

Similarly, no change has taken place while the case has been pending in this Court which obviates the need to decide whether the 1968 Amendments apply to protect the rights of persons not yet displaced at the time of those amendments, and whether they require a comprehensive relocation plan together with guarantees of actual relocation housing.[87]

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[85] *Citizens to Preserve Overton Park* v. *Volpe*, O.T. 1970, No. 1066, Brief for Petitioners at 21 n. 16.

[86] The insignificance accorded to such policy statements is indicated by a recent amendment to the Department's Regulations providing that:

> "No such direction, policy, rule, procedure, or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." 35 Fed. Reg. 6322 (1970) amending 23 C.F.R., Chap. 1, pt. 1 §132.

[87] On October 30, 1970, IM 80-2-70 was issued by the Federal Highway Administrator. It supercedes IM 80-1-68, supplying detailed relocation regulations. It is not effective until 90 days after issuance, and is inapplicable to projects on which construction has been previously authorized and persons previously displaced.

A November 6, 1970 memorandum from the Under Secretary of Transportation (Br. App. 45-46) indicated that:

> Further construction involving the Triangle Area will be authorized only after the people now living within the right-of-way in that area have been relocated into adequate decent,

B. In the Absence of Compliance with the Requirements of the 1968 Relocation Amendments, Administrative Action by State and Federal Officials Cannot Be Upheld on the Basis of General Assurances That Efforts Are Being and Will Be Made to Relocate Persons Displaced, and That Adequate Relocation Housing Exists.

The district court found that the major requirements of the 1968 amendments and the implementing IM 80-1-68 were not intended to apply to persons not yet displaced as of their effective date where authority to acquire right-of-way had previously been given. To the limited extent the court did consider the statute applicable, it relied on assurances made at the trial by state and federal officials that appropriate efforts were being made to comply with the provisions of the 1968 Act "in a practical if not a formal manner, even though such compliance is not legally required" (App. 55a), and to deal with persons residing in the Triangle "in a manner that comports with the federal statutes and regulations" (App. 56a). The court further found that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees . . ." (App. 57a).

Petitioners submit that if, as argued *supra*, the applicable law and regulations required the submission of comprehensive relocation plans to federal authorities for their review and approval, then agency action which disregarded those specifically mandated procedures cannot be upheld on the basis of mere assurances that the rights of displaced

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safe and sanitary housing, in accordance with DOT Order 5620.1.

While the memoranda constitute additional evidence of the Department's recognition that Section 502 does in fact require a comprehensive relocation plan together with actual provision of adequate relocation housing, they do not moot the issues in this case for the same reasons that the April 1970 regulations do not.

persons would be protected or on the basis of evidence which the court considered *de novo* with respect to the availability of relocation housing. Further, petitioners submit that the court's purported finding that adequate replacement housing would be available is clearly erroneous.

1. *Reversal Is Required Because the Procedures Mandated by Law with Respect to the Submission for Review and Approval of a Comprehensive Relocation Plan Were Not Followed.*

As noted *supra*, no relocation plan comporting with the requirements of the 1968 amendments and IM 80-1-68 was ever prepared. Instead, the Department of Transportation relied on conclusory, general assurances[88] that the State Road Commission would adequately rehouse persons displaced by all its projects across the State.[89] The partial relocation plan submitted subsequently by the State Road Commission,[90] concededly inadequate under the standards

[88] The position taken by the Department of Transportation throughout this litigation, and apparently approved by the district court, has suggested that Section 502's requirement of "satisfactory assurances" is so open-ended and undefined that mere verbal or even unarticulated assurances are sufficient. This Court should not readily infer that Congress gave the agency essentially standardless and thus unconstitutional discretion. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958).

[89] The State Road Commission's assurances, dated November 13, 1968, stated:

> "The State Road Commission does provide timely, orderly and efficient relocation of displaced individuals and families to decent, safe and santiary housing with minimum hardship to those affected, to the extent such housing is reasonably available. . . .
>
> "The State Road Commission is making a sincere and realistic effort to comply with the provisions of this Instructional Memorandum to the extent it can reasonably be done on previously authorized projects, and will continue such efforts on projects authorized in the future . . ." (Pl. Ex. No. 5).

[90] App. 386a. See Def. Ritchie Ex. No. 1, App. 99a-126a.

of the IM, and prepared solely for this litigation, was not even reviewed by the Department as required by law.[91]

There are three general considerations which make careful judicial review of administration action in this particular situation essential. The first is that the agency involved has, itself, helped to create the harm which Congress has now directed it to correct. In the past, agencies have ordinarily been set up to administer remedial legislation regulating other parties' activities in the public interest. The agency here, however, is not the "Department of Relocation" (nor is there even an individual charged with the sole responsibility of relocation). The Department of Transportation's primary function is that of a road builder: to build the interstate system, and to build it fast. In the process, it has displaced thousands upon thousands of people who have not been adequately rehoused. Now Congress has said: reform yourself. Under these circumstances, the Department's procedures and decisions regarding relocation should be closely scrutinized.

A second factor calling for careful judicial review is that there are no internal agency review procedures available. Neither federal nor state highway agencies have established procedures of receiving, investigating or resolving relocation complaints. At trial, a Department of Transportation official testified that the only means of appeal that

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[91] App. 209a, 407a-408a. The Department also relied on the impressions of its right of way officer who relied on the same general, conclusory assurances by the State and its "half of a relocation plan" (App. 168a). He also relied on his experience in supervising the administration of the inadequate relocation programs under the 1962 relocation amendments, and studies he had undertaken in February and March, 1968 (App. 175a-180a). He conveniently ignored his February and March, 1968, studies which pointed out serious deficiencies in the availability of relocation housing (App. 84a-98a; Pl. Ex. No. 12. See *supra* 7-9).

he could recommend to an aggrieved person was writing to his Congressman or the President.[92]

A third compelling reason for the careful scrutiny of agency action in this case is that the Triangle residents have been faced with the bewildering complexities of dealing with two separate agencies, which has compounded the ordinary problems characterizing agency proceedings.[93] Moreover, throughout these proceedings, particularly in the district court, the plaintiffs have encountered "the pervasive impatience—if not hostility" of the agencies.[94]

While the district court acknowledged that the actions of governmental highway agencies are judicially reviewable;[95] the court so restricted its review as to render it virtually meaningless.

Thus, rather than looking to the factual record on which the administrative officials based their determinations, the court relied, in sustaining those determinations, on oral assurances, given to the court during the trial; on the basis of which it concluded that federal and state authorities were making a "sincere" effort, and that defendants' "assurances" that they would comply with the law were given "in good faith." [96]

While these obviously inadequate oral assurances appear to have been the basis for the court's decision, the opinion

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[92] App. 227a.

[93] See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1253 (1965), noting that agency proceedings are characterized by "closed doors, Kafka-like uncertainty, difficulty in locating responsibility, and rigid adherence to a particular point of view."

[94] See *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) where agency hostility was held to be a factor requiring rejection of its determination.

[95] App. 46a-48a; 314 F. Supp. at 26-27.

[96] App. 56a; 314 F. Supp. at 30.

also implies that the federal officials' actions were in "substantial compliance" with federal laws and regulations (App. 56a; 314 F. Supp. at 30) and were "premised on rational grounds" (App. 55a; 314 F. Supp. at 30). Even assuming that the opinion was in any sense grounded on such findings, and that they were supported by the record, it is clear that the standards of judicial review implied are wholly inadequate. In *Charlton* v. *United States*, 412 F.2d 390 (3d Cir. 1969), the court rejected the contention that an agency's "substantial compliance" with its statute and regulations satisfied the requirements of the Administrative Procedure Act,[97] and held that agency action had to be supported by substantial evidence. The substantial evidence test has been found applicable to administrative decisions regarding relocation.[98] While the evidentiary record in a case like this differs from the kind of record developed by federal agencies with formal hearing mechanisms, there is still an administrative record that a court can and should review. In a recent decision involving review of route location decisions by the Department of Transportation, a district court defined the administrative record to include all "the information which the Administrator had before him," and held: "It is on that record that the Administrator acted and on that record that his action must be judged." *Road Review League* v. *Boyd*, 270 F. Supp. 650, 662 (S.D. N.Y. 1967). Such a requirement

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[97] The district court properly noted the applicability of the Administrative Procedure Act. App. 47a-48a; 314 F. Supp. 26-27.

[98] See, *e.g.*, *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433, 443 (N.D. Cal. 1968) (involving the urban renewal relocation statute); Note, *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472 (1969). Moreover the substantial evidence test set forth in *Charlton* v. *United States*, *supra*, has been followed in recent cases. *DeLong* v. *Hampton*, 422 F.2d 21 (3d Cir. 1970); *Pauley* v. *United States*, 419 F.2d 1061 (7th Cir. 1969) (Arbitrary and capricious test also applied.)

compels a rational decision-making process by the agency, rather than allowing it to rely upon belatedly contrived rationalizations for its action (such as the Triangle "relocation plan").

The district court erred by not reviewing the record in this case to determine whether the agency followed procedures required by law, and whether the agency's determinations were supported by substantial evidence, or were instead arbitrary and unlawful.

The Department of Transportation recognized in promulgating IM 80-1-68 that it is vital to the protection of persons to be displaced that there be an adequate mechanism for gathering information regarding relocation. Further, the agency specified in the regulations the kind of information essential to a determination of the adequacy of relocation housing so that the Department might have a basis for determining whether state assurances were satisfactory.

It is fundamental that once having prescribed the procedure through which it is to reach its determination, an agency is not free capriciously to reject that procedure.[99] Thus the federal defendants could not lawfully accept the state highway commission's relocation assurances without making a "review and approval" of the required factual "survey" and "analysis" prepared by the State. IM 80-1-68, ¶7.

Further, on the administrative record presented here the Department of Transportation's conclusion that adequate protection was being accorded to persons displaced in the Triangle cannot be sustained. It is essential that an administrative agency base its actions on adequate inquiry into

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[99] *Service* v. *Dulles*, 354 U.S. 363 (1957). Cf. *D.C. Federation of Civic Associations, Inc.* v. *Airis*, 391 F.2d 478 (D.C. Cir. 1968); *Moss* v. *C.A.B.*, 430 F.2d 891, 901 (D.C. Cir. 1970).

and consideration of the relevant facts,[100] and that an adequate record of the grounds for administrative action be made and disclosed so that judicial review is possible.[101]

In the instant case there was virtually no factual investigation or analysis by the administrative agencies involved of the relocation problems posed by the Triangle projects as there would have been if a proper relocation plan had been prepared and reviewed. The analyses prepared by the Department of Transportation of relocation housing problems in Charleston all preceded the enactment of the 1968 relocation amendments.[102] The State's relocation plan ignored vital considerations such as race and competing displacement, was inadequate under the regulations, and was never reviewed by federal officials. This administrative record regarding the existence, in fact, of sufficient adequate housing consists solely of bald, unsubstantiated "assurances" by the State.[103] Neither the written assurances nor

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[100] See, *e.g.*, *Scenic Hudson Preservation Conference* v. *Federal Power Comm.*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Shannon* v. *Department of Housing and Urban Development*, —— F.2d —— (3d Cir., Dec. 30, 1970, No. 18,397); *Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966); see also, 425 F.2d 543, 548 (D.C. Cir. 1969); *Michigan Consolidated Gas Co.* v. *Federal Power Comm.*, 283 F.2d 204, 226 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 913 (1960).

[101] See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). See also *Thorpe* v. *Housing Authority*, 393 U.S. 268, 283 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[102] App. 84a-98a.

[103] See Pl. Ex. No. 5, letter dated November 13, 1968, from M. R. Hamill, then State Road Commission of West Virginia to the Bureau of Public Roads:

> The State Road Commission assures the Bureau of Public Roads that the provisions of paragraph 5(a) will be complied with on all Federal-Aid projects. . . .
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> • • • •
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> The State Road Commission does provide timely, orderly and efficient relocation of displaced individuals. . . .

the oral assurances given at trial reveal any numerical factual underpinning. The Department accepted the State's assurances without providing any reasons or analysis.[104] The two federal officials who testified to the assurances of the State conceded that they had relied on assumed expertise and past experience,[105] despite the fact that this experience had occurred prior to the 1968 amendments when virtually no significant relocation requirements existed.

In short, the administrative record contains no complete and detailed relocation assurances submitted by the State. Under these circumstances, the federal officials' conclusions that the State could, in fact, provide the adequate relocation housing required by law should not have been sustained by the district court.[106]

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[104] Pl. Ex. No. 7, letter from Bureau of Public Roads to M. R. Hamill, dated November 20, 1968.

[105] App. 176a-177a.

[106] In *Scenic Hudson Preservation Conference* v. *FPC*, *supra* n. 100, the court remanded the case to the agency because of the agency's failure to compile a *sufficient* record. In *Shannon* v. *HUD*, *supra* n. 100, the court held that the agency's decision "must be an informed one" (slip op. p. 23), and that "the agency must utilize some institutionalized method" whereby it has before it the relevant information (slip op. pp. 20-21). Similarly, in *Office of Communications of the United Church of Christ* v. *FCC*, *supra* n. 94, the court held that an administrative agency has "an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation" of the performance of the party in question. 425 F.2d at 548.

For cases in which courts have remanded to agencies for the reason that the grounds for the administrative decision did not clearly appear on the record, see *e.g.*, *Medical Committee for Human Rights* v. *Securities and Exchange Commission*, 432 F.2d 659, 676 (D.C. Cir. 1970); *Environmental Defense Fund* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); see also *Williams* v. *Robinson*, 432 F.2d 637, 641 (D.C. Cir. 1970); *Environmental Defense Fund* v. *Ruckelshaus*, —— F.2d —— (D.C. Cir., Jan. 7, 1971, No. 23813) (slip op. pp. 22, 23).

The district court also erred in ruling that the agency action could be sustained on the basis of the court's *de novo* consideration of evidence with respect to the availability of relocation housing and purported finding that "adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees." [107] In making this factual finding, the district court usurped the function of the agency. If the notion of agency expertise is to have any meaning, it is clear that the agency must make the initial factual determination. This is particularly important in the present case where newly enacted programs are concerned, since the agency should in the first instance have an opportunity to develop reasonable procedures to enforce the new law, and should be allowed to develop the appropriate expertise.

2. *The District Court's Purported Finding That Relocation Housing Was Adequate Was Clearly Erroneous.*

In the first place the district court's determination that relocation housing was adequate was apparently made without reference to the standards mandated by Section 502 and IM 80-1-68, since the court took the position that they were inapplicable. Thus the court based its finding on only a few limited factors, ignoring many of the elements which ¶7 of IM 80-1-68 provides must be considered, such as the type and quality of available housing, its proximity to transportation and employment, the effect of concurrent displacement, and the detailed standards as to what con-

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[107] App. 57a, 314 F. Supp. at 31. That the court undertook to make this determination is particularly surprising in light of its statement that "courts should not undertake the administration of complex and far reaching federal programs, but upon appropriate judicial review should determine only whether the agency administering the program is in substantial compliance with the applicable statutes and regulations." App. 55a-56a, 314 F. Supp. at 30.

stitutes "decent, safe and sanitary" housing. Indeed, the record does not even contain the information necessary to make a proper determination under the applicable law and regulations, since the respondents failed to provide it and the district court ruled that they were not required to do so.[108]

Even apart from the legal standard applied, the record does not support the court's finding that adequate relocation housing was available, on a nonracial basis. This finding was based on the court's conclusion that:

> Even should no housing be available for dislocateees in the private housing market, the evidence clearly demonstrates that there is ample public housing in the Charleston area to accommodate the limited number of individuals remaining in the I-77 corridor in the Triangle area.[109]

In reaching this conclusion, the court relied heavily on the "Triangle Relocation Plan" prepared by the state defendant for this lawsuit.[110] This plan asserted that the majority of the Triangle residents "appear" to be eligible for public housing. The plan also reasoned that since there was a *turnover* of approximately 30% of the city's public housing units, and since highway displacees have preferted access to public housing, there would be available over the span of time in which the relocation from the Triangle

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[108] The record's inadequacy was further exacerbated by the court's denial of all discovery to the plaintiffs. App. 38a-39a, 314 F. Supp. at 22-23. *Cf. Citizens to Preserve Overton Park* v. *Volpe*, 432 F.2d 1307, 1316, n. 1. (6th Cir. 1970) (Celebrezze, J., dissenting), *cert. granted* December 7, 1970, O.T. 1970, No. 1066; *Office of Communications of the United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

[109] App. 57a, 314 F. Supp. at 31.

[110] Def. Ritchie Ex. No. 1, App. 99a-126a.

would take place, approximately 319 units—more than the number of families to be displaced in the Triangle.

This analysis fails first in that it takes no account of concurrent displacement, a factor considered of great importance in the regulations. That is, the plan considers the Triangle in isolation. But, as the court found, the Triangle displacees constituted only one-third of those to be displaced by the two projects entering the district, as of the time of trial, and less than one-seventh of the total who either had been or were to be displaced.[111] And even these figures do not take into account displacement by other highway projects outside the Triangle involved in the Interstate system in Charleston, or by other public programs. There was no evidence whatever of the number of such displacees who would be eligible for public housing and thus compete with the Triangle displacees.

Secondly, the record contains no income statistics or other evidence showing that the Triangle residents were in fact eligible for public housing. The state plan's assumption of eligibility relied solely on the fact that the average *rents* in the area were one-half those in the city as a whole.

Finally, in contrast to the reported *turnover* rate of 30%, the record shows a *vacancy* rate in public housing of about 1%[112] and a city-wide vacancy rate of 2.7%.[113] These figures indicate that adequate relocation housing was not

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[111] App. 45a-46a, 314 F. Supp. at 26.

[112] The Executive Director of the Housing Authority testified that at any time an average of eleven of the total 934 units were vacant. App. 245a. He also testified that there was a waiting list of 600 families who had been found eligible for public housing, and that on the average a person without priority would wait 18 to 24 months to be admitted. App. 246a-247a.

[113] App. 299a.

available in Charleston, since it is the vacancy rate which is relevant in determining the number of excess units available for relocation housing, and since a vacancy rate of less than 3% has been found by authorities experienced in these problems to be inadequate for relocation planning.[114] The district court's finding that there was adequate public housing[115] available to the dislocatees is, therefore, clearly erroneous.

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[114] The relocation guidelines of the Department of Housing and Urban Development, which administers the federal programs causing the greatest amount of displacement provide:

> Turnover, in essence, represents the process by which one occupied unit becomes vacant and reoccupied. It is a "neutral" process with respect to altering the supply of excess housing, i.e., the number of units which are in excess of the combined amount required to accommodate locality households and provide for mobility. It is only the excess units—or vacancies—which can be considered as supplying relocation housing resources for displaced families.
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> . . . .
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> 1. For determination of number of existing, standard vacant units available for relocation:
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> *Policy:* Only that amount of standard vacant rental housing which is in excess of a 3 percent renter vacancy rate shall be counted in the relocation planning. Furthermore, only those units in excess of the 3 percent vacancy rate which are appropriate by unit size (i.e., 1 bedroom, 2 bedroom, 3 bedroom, etc.) and which are appropriate by rent ranges required by the displaced households shall be counted as resources. (Department of Housing and Urban Development, Regional Circular No. 907, *Relocation Resources and Criteria*, February 26, 1968.)

These guidelines were presented to the district court. App. 299a.

[115] Although the district court proceeded on the assumption that no housing would be available to the Triangle displacees in the private housing market (App. 57a; 314 F. Supp. at 31), the federal respondents seek to bolster the court's ruling by reference to evidence of the availability of such private housing (Brief for the Federal Respondents in Opposition to Certiorari, at 5-7). Evidence with respect to availability of *private* housing, not relied on by the court, clearly cannot be used to sustain the court's factual conclusions with respect to *public* housing. And, in any event, the evidence relied on by respondents does not support a conclusion

III

The Questions of Retroactive Application and Appropriate Remedy.

Petitioners' position throughout this litigation has been that the highway officials have failed to meet their obligations under the 1968 Highway Act by failing to insure that adequate housing was available for the Triangle displacees. They have urged that the respondents should meet this obligation by the method proposed in their own regulations, that of preparing a thorough relocation plan which would analyze fully the needs of the persons to be dis-

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that adequate housing was available in the private market. The fact that the state had relocated about 2000 persons in the previous two years necessarily removed available housing from the supply without replacing it. Experience with prior relocation cases was under the prior statute which did not even require replacement housing, much less set standards for it. Finally, the evidence indicated that the only significant change since the time of the federal studies which warned of a possibly "critical" shortage of housing in Charleston (Pl. Ex. No. 12, App. 84a-98a) was the availability of rent supplements available under the new act (App. 425a-428a). Rent supplements provide no relief for families who are living in apartments beyond their means when the two year payments expire (App. 428a). The present Secretary of Transportation has himself noted in a related context that the very fact that rent supplements are needed is proof that available housing is insufficient:

> [O]ne of the basic protections of the bill is that displacement is not to take place unless there is advance assurance that adequate housing, at prices they can afford, will be available to these families. Payment of a RAP (relocation adjustment payment or rent supplement) indicates that this requirement is not being met. Second, the adjustment payment only defers the hardship for two years. At the end of that period, the payment ceases, and the household is left in housing which is beyond its means.

Statement of Governor John A. Volpe, *Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations*, 90th Cong., 2nd Sess. at 481 (1968).

located, and the housing available to supply these needs, so that it could be demonstrated in a documented and reviewable manner whether the requirements of the statute were being met. If the Court accepts this view, it is necessary to consider what remedy is now appropriate to correct the wrongs which have been committed.

Congress intended that every person displaced by federal highway programs since August 23, 1968 be assured the availability of satisfactory replacement housing. The failure of the administrators to fulfill this obligation, combined with their zeal to complete the highway and the realities of the inadequate supply of housing in Charleston has resulted in the displacement of a major portion of those on the right-of-way in the Triangle,[116] many into demonstrably inadequate housing. Moreover, the State Road Commission has failed in several respects to meet even the minimal assurances it made at the trial. For those who remain to displaced, the preparation of a relocation plan, which meets the requirements of the regulations,[117] and which would be reviewed by the district court may be appropriate relief.

For those who have moved, it is submitted that they should not be put in the position of being told that although they were denied the rights which Congress intended them to have, they are yet to be compelled because of administrative wrongdoing to remain in inadequate housing. A remedy is now available to deal with this problem. In the Federal-Aid Highway Act of 1970, enacted Decem-

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[116] At the time of trial there were 284 persons to be displaced in the Triangle. App. 46a. Petitioners' most recent survey, taken December 23, 1970, shows that 65 persons and 14 businesses remain. The State respondents assert that 35 persons and 5 businesses remained on January 28, 1970.

[117] The more detailed requirements of I.M. 80-2-70 may be applicable to a plan now formulated. See *supra* at n. 87.

ber 31, 1970,[118] Congress authorized the Secretary to approve as "a part of the cost of construction" of Federal-aid highways the cost of building new housing and purchasing, rehabilitating or moving existing housing as replacement housing for dislocatees where a project cannot proceed because of a lack of available housing "as required by section 502" of Title 23. This statute provides a readily available method to deal with the housing needs of highway dislocatees in Charleston. On remand, the respondents should be required to locate all those who have been displaced from the Triangle and to present to the court a report of their present housing condition. Where they are now in satisfactory and acceptable housing, nothing more need be done. Where, however, they have been forced into inadequate or substandard housing, the respondents should be compelled to use the provision of the 1970 Highway Act authorizing the construction, rehabilitation or purchase of housing for dislocatees to provide them with "decent, safe and sanitary housing."[119]

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[118] Pub. L. 9-605, §117; Br. App. 13-14. As already mentioned, *supra* n. 71, petitioners suggest that this new provision demonstrates that Congress did indeed intend the 1968 act to *require* the provision of replacement housing for dislocatees.

[119] This suggestion is in accord with the relief granted in *Shannon v. Department of Housing and Urban Development*, —— F.2d ——, (3d Cir., Dec. 30, 1970, No. 18,397). There the Court ruled that a low rent housing project had been authorized and financed by HUD without regard for its obligation to promote fair housing and in fact in a manner which promoted racial separation. By the time the appeals court ruled, the building was completed and occupied. The court held that relief was nonetheless required, and that the case was not moot. It suggests as possible remedies on remand the withdrawal of further HUD support, the possible replacement of rent supplement tenants with market rental tenants, or the sale of the project to a profit-making owner. Slip Op. at 23-24.

As DOT regulations permit the free amendment of projects already approved to take into consideration changed conditions, PPM 21-7, there should be no technical difficulty in applying this remedy to the on-going projects. Cf. I.M. 80-1-68, ¶4b, Br. App. 19-20.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded to the district court with instructions that further displacement be enjoined until the respondents have prepared a relocation plan in accordance with the regulations for all remaining displacees, and that those already displaced in violation of the law be afforded the remedy suggested in Point III.

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APPENDIX A

Statutes

1962 RELOCATION AMENDMENT

(23 U.S.C. §133)

(Pub. L. 87-866, §5(a), Oct. 23, 1962, 76 Stat. 1146)

(Repealed effective July 1, 1970; See Pub. L. 90-495, §37, Aug. 23, 1968, 82 Stat. 836, and Pub. L. 91-605, §120, Dec. 31, 1970.)

§133. Relocation assistance

(a) As used in this section the term "eligible person" means any individual, family, business concern (including the operation of a farm) and nonprofit organization to be displaced by construction of a project.

(b) The Secretary prior to his approval of any project under section 106 of this title for right-of-way acquisition or actual construction shall require the State highway department to give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway.

(c) The Secretary shall approve, as part of the cost of construction of a project on any of the Federal-aid highway systems, such relocation payments as may be made by a State highway department, or a local public agency acting as an agent for the State highway department for this purpose, to eligible persons for their reasonable and necessary moving expenses caused by their displacement from real property acquired for such project. However, the Sec-

retary shall not require a State to pay relocation payments where not authorized by State law.

(d) Payments under this section shall be subject to such rules and regulations as may be prescribed by the Secretary, and shall not exceed $200 in the case of an individual or family, or $3,000 in the case of a business concern (including the operation of a farm) or nonprofit organization. In the case of a business (including the operation of a farm) and in the case of a nonprofit organization, the allowable expenses for transportation under this subsection shall not exceed the cost of moving 50 miles from the point from which such business or organization is being displaced. Such rules and regulations may include provisions authorizing reimbursement for payments made to individuals and families of fixed amounts (not to exceed $200 in any case) in lieu of their respective reasonable and necessary moving expenses.

(e) This section shall apply only with respect to projects approved under section 106 of this title after the date of enactment of this section.

RELOCATION ASSISTANCE STUDY: REPORT TO CONGRESS BY JULY 1, 1967

(Pub. L. 89-574, §12, Sept. 13, 1966, 80 Stat. 770)

(a) The Secretary of Commerce is authorized and directed to make, in cooperation with the Secretary of the Department of Housing and Urban Development, the State highway departments, and other affected Federal and State agencies, a full and complete study and investigation for the purpose of determining what action can and should be

taken to provide additional assistance for the relocation and reestablishment of persons, business concerns, and nonprofit organizations to be displaced by construction of projects on any of the Federal-aid highway systems, and to submit a report of the findings of such study and investigation, together with recommendations, to the Congress not later than July 1, 1967. The study and investigation shall include, but shall not be limited to—

(1) the need for additional payments or other financial assistance to such displaced persons, business concerns, and nonprofit organizations, and the extent to which the making of such payments and the providing of other financial assistance should be mandatory;

(2) the feasibility of constructing, within the right-of-way of a highway or upon real property adjacent thereto acquired for such purposes, publicly or privately owned, buildings, improvements, or other facilities to aid in the relocation of such displaced persons, business concerns, and nonprofit organizations;

(3) the extent to which the costs of acquiring such real property and constructing such buildings, improvements and other facilities should be paid from the highway trust fund; and

(4) sources of funds to pay the portion of the costs of acquiring such real property and constructing such buildings, improvements and other facilities, which is not properly chargeable to the highway trust fund.

Appendix A

1968 HIGHWAY RELOCATION AMENDMENTS

(23 U.S.C. §501 *et seq.*)

(Pub. L. 90-495, §30, Aug. 23, 1968, 82 Stat. 830)

§501. Declaration of policy

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

§502. Assurances of adequate relocation assistance program

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any persons, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

§503. Administration of relocation assistance program

In order to prevent unnecessary expenses and duplication of functions, a State highway department may make relocation payments or provide relocation assistance or otherwise carry out the functions required under this chapter by utilizing the facilities, personnel, and services of any other Federal, State, or local governmental agency having an established organization for conducting relocation assistance programs.

§504. Federal reimbursement

(a) The Secretary shall approve, as a part of the cost of construction of a project under any Federal-aid highway program which he administers, the cost of providing the payments and services described in section 502, except that notwithstanding any other law, the Federal share of the first $25,000 of such payments to any person, on account of any real property acquisition or displacement occurring prior to July 1, 1970, shall be increased to 100 per centum of such cost.

(b) Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property.

§505. Relocation payments

(a) Payments for actual expenses. Upon application approved by the State agency, a person displaced by any highway project approved under section 106 or section 117 of this title may elect to receive actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property.

(b) Optional payments—dwellings. Any displaced person who moves from a dwelling who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive—

(1) a moving expense allowance, determined according to a schedule established by the Secretary, not to exceed $200; and

(2) a dislocation allowance of $100.

(c) Optional payments—businesses and farm operations. —Any displaced person who moves or discontinues his business or farm operation who elects to accept the payment authorized by this section in lieu of the payment authorized by subsection (a) of this section, may receive a fixed relocation payment in an amount equal to the average

annual net earnings of the business or farm operation, or $5,000, whichever is the lesser. In the case of a business, no payment shall be made under this subsection unless the State agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not part of a commercial enterprise having at least one other establishment, not being acquired by the State or by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one half of any net earnings of the business or farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two year period.
Added Pub. L. 90-495, § 30, Aug. 23, 1968, 82 Stat. 831.

§506. Replacement housing

(a). In addition to amounts otherwise authorized by this title, the State agency shall make a payment to the owner of real property acquired for a project which is improved by a single-, two-, or three-family dwelling actually owned and occupied by the owner for not less than one year prior to the initiation of negotiations for the acquisition of such property. Such payment, not to exceed $5,000, shall be the amount, if any, which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the Secretary, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of em-

ployment and available on the private market. Such payment shall be made only to a displaced owner who purchases and occupies a dwelling within one year subsequent to the date on which he is required to move from the dwelling acquired for the project. No such payment shall be required or included as a project cost under section 504 of this title if the owner-occupant receives a payment required by the State law of eminent domain which is determined by the Secretary to have substantially the same purpose and effect as this section and to be part of the cost of the project for which Federal financial assistance is available.

(b) In addition to amounts otherwise authorized by this title, the State agency shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under subsection (a) of this section which dwelling was actually and lawfully occupied by such individual or family for not less than 90 days prior to the initiation of negotiations for acquisition of such property. Such payment, not to exceed $1,500, shall be the amount which is necessary to enable such person to lease or rent for a period not to exceed 2 years, or to make the down payment on the purchase of, a decent, safe, and sanitary dwelling of standards adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.

§507. Expenses incidental to transfer of property

(a) In addition to amounts otherwise authorized by this title, the State shall reimburse the owner of real property acquired for a project for reasonable and necessary ex-

penses incurred for (1) recording fees, transfer taxes, and similar expenses incidental to conveying such property; (2) penalty costs for prepayment of any mortgage entered into in good faith encumbering such real property if such mortgage is on record or has been filed for record under applicable State law on the date of final approval by the State of the location of such project; and (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting of title in the State, or the effective date of the possession of such real property by the State, whichever is earlier.

(b) No payment received under this chapter shall be considered as income for the purposes of the Internal Revenue Code of 1954, or for the purpose of determining the eligibility or the extent of eligibility of any person for assistance under the Social Security Act or any other Federal law.

§508. Relocation services

(a) Each State shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order—

(1) to determine the needs, if any, of displaced families, individuals, business concerns, and farm operators for relocation assistance;

(2) to assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the fam-

ilies and individuals displaced, housing meeting the standards established by the Secretary for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

(3) to assist owners of displaced businesses and displaced farm operators in obtaining and becoming established in suitable locations; and

(4) to supply information concerning the Federal Housing Administration home acquisition program under section 221(d) (2) of the National Housing Act, the small business disaster loan program under section 7(b) (3) of the Small Business Act, and other State or Federal programs offering assistance to displaced persons.

(b) Nothing in this chapter shall be construed to prohibit any person from exercising any right or remedy available to him under State law with respect to any action of a State agency in carrying out this chapter.

§509. Relocation assistance programs on Federal highway projects

Notwithstanding any other provision of law, on and after the effective date of this title any Federal agency which acquires real property for use in connection with a highway project authorized by section 107 and chapter 2 of this title or any other Federal law shall, in accordance with regulations issued by the Secretary, provide the payments and services described in sections 502, 505, 506, 507, and 508 of this title. When real property is acquired by a

State or local governmental agency for such a Federal project for purposes of this chapter, the acquisition shall be deemed an acquisition by the Federal agency having authority over such project.

§510. Authority of the Secretary

(a) To carry into effect the provisions of this chapter, the Secretary is authorized to make such rules and regulations as he may determine to be necessary to assure—

(1) that the payments authorized by this chapter shall be fair and reasonable and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the State agency making such determination.

(b) The Secretary may make such other rules and regulations consistent with the provisions of this chapter as he deems necessary or appropriate to carry out this chapter.

§511. Definitions

As used in this chapter—

(1) The term "person" means—

(A) any individual, partnership, corporation, or association which is the owner of a business;

(B) any owner, part owner, tenant, or sharecropper who operates a farm;

(C) an individual who is the head of a family; or

(D) an individual not a member of a family.

(2) The term "family" means two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption, or legal guardianship.

(3) The term "displaced person" means any person who moves from real property on or after the effective date of this chapter as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway of other real property on which such person conducts a business or farm operation.

(4) The term "business" means any lawful activity conducted primarily—

(A) for the purchase and resale, manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public; or

(C) by a nonprofit organization.

(5) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such products or commodities in sufficient quantity to be

capable of contributing materially to the operator's support.

(6) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government and any corporation wholly owned by the Government.

(7) The term "State agency" means a State highway department or any agency designated by a State highway department to administer the relocation assistance program authorized by this chapter.

FEDERAL-AID HIGHWAY ACT OF 1970

(Pub. L. 91-605, Dec. 31, 1970)

Construction of Replacement Housing

Sec. 117. (a) Sections 510 and 511 of title 23, United States Code including all references thereto are hereby renumbered as sections 511 and 512 respectively.

(b) Chapter 5 of title 23, United States Code, is amended by inserting immediately after section 509 the following new section:

"§510. Construction of replacement housing

"(a) The Secretary may approve as a part of the cost of construction of any project on any Federal-aid system the cost of (A) constructing new housing, (B) acquiring existing housing, (C) rehabilitating existing housing, and (D) relocating existing housing, as replacement housing for individuals and families where a proposed project on the Federal-aid system cannot proceed to actual construction because replacement housing is not available and cannot otherwise be made

available as required by section 502 of this title. For the purposes of this subsection the term 'housing' includes all appurtenances thereto.

"(b) State highway departments shall, wherever practicable, utilize the services of State or local governmental housing agencies in carrying out this section."

(c) The analysis of chapter 5 of title 28, United States Code, is amended by adding after

"509. Relocation assistance programs on Federal highway projects."

the following:

"510. Construction of replacement housing."

(d) The definition of the term "construction" in section 101(a) of title 23, United States Code, is amended to read as follows:

"The term 'construction' means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in the Department of Commerce), acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, and acquisition, and rehabilitation, relocation, and construction of replacement housing."

Appendix A

EFFECTIVE DATE OF RELOCATION PROVISIONS

Sec. 120. Section 37 of the Federal-Aid Highway Act of 1968 is amended to read as follows:

"EFFECTIVE DATE

"Sec. 37. (a) Except as otherwise provided in subsection (b) of this section, this Act and the amendments made by this Act shall take effect on the date of its enactment, except that until July 1, 1970, sections 502, 505, 506, 507, and 508 of title 23, United States Code, as added by this Act, shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. Except as otherwise provided in subsection (b) of this section, after July 1, 1970, such sections shall be completely applicable to all States. Section 133 of title 23, United States Code, shall not apply to any State if sections 502, 505, 506, 507, and 508 of title 23, United States Code, are applicable in that State, and effective July 1, 1970, such section 133 is repealed, except as otherwise provided in subsection (b) of this section.

"(b) In the case of any State (1) which is required to amend its constitution to comply with sections 502, 505, 506, 507, and 508 of title 23, United States Code, and (2) which cannot submit the required constitutional amendment for ratification prior to July 1, 1970, the date of July 1, 1970, contained in subsection (a) of this section shall be extended to July 1, 1972."

Appendix A

FAIR HOUSING ACT OF 1968

(42 U.S.C. §3601 *et seq.*)

(Pub. L. 90-284, Title VIII, April 11, 1968, 82 Stat. 81)

§3601. Declaration of policy.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§3608. Administration-Authority and responsibility

(a) .....

(b) .....

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

APPENDIX B

Regulations & Policy Directives

Circular Memorandum dated January 23, 1968 (Pl. Ex. No. 9), appears in the separate Appendix at pp. 79a-81a.

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

September 5, 1968

INSTRUCTIONAL MEMORANDUM 80-1-68
34-10

SUBJECT: Relocation Assistance and Payments — Interim Operating Procedures (RCS 34-01-03) (B/B 04-R-2211)

There are enclosed Interim Operating Procedures covering the administration of the Highway Relocation Assistance Program established by Chapter 5 of Title 23, U.S.C.

These procedures supersede paragraph 3 of PPM 80-5 and will be incorporated in a new Policy and Procedure Memorandum after a period of operation thereunder.

/s/ F. C. TURNER
F. C. Turner
Director of Public Roads

/s/ LOWELL K. BRIDWELL
Lowell K. Bridwell
Federal Highway Administrator

Appendix B

[Including Amendments of Paragraphs 5a(2), 5a(5), 7b(2) and 9c(2) dated October 2, 1968 and November 5, 1968]

Interim Operating Procedures Relocation Assistance and Payments

1. Purpose

In accordance with Chapter 5 of Title 23, U.S.C., this memorandum prescribes policies and procedures relating to the following:

a. Administration of the relocation program and the provision of relocation payments and services to individuals, families, businesses, and farm operators displaced by Federal-aid highway construction;

b. Eligibility for reimbursement of relocation payments and costs of services by State and State designated agencies; and

c. Relocation payment records and relocation advisory assistance reports.

2. Effective Date and Applicability

a. The provisions of this memorandum are effective August 23, 1968, and the payments and services described herein shall be provided by the State to the extent that such State is able to comply herewith under its laws. After July 1, 1970, such payments and services shall be provided by all States.

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights-of-way which are occu-

pied by an individual, family, business, farm operator, or nonprofit organization.

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

(3) Rights-of-way acquired without Federal participation upon which the State intends to construct a Federal-aid project from which as of August 23, 1968, individuals, families, business, farm operations, and nonprofit organizations have not been displaced.

c. The relocation payments and services described in this memorandum shall be provided by any Federal agency which acquires property for highway projects authorized under Chapters 1 and 2 of Title 23, U.S.C. When real property is acquired by a State or local governmental agency for such a Federal project, the acquisition shall be deemed to be an acquisition by the Federal agency having authority over such project.

3. AUTHORITY

Statutory authority for this memorandum is set forth in Chapter 5 of Title 23, U.S.C. (23 U.S.C. 501 *et seq.*)

4. PROGRAMMING

. . .

b. Any project agreement with a State which was executed on or before August 23, 1968, and which requires the use of property not acquired as of that date shall be amended to include the cost of providing the payments and services described in this memorandum. Any number of

projects may be amended in a single action with each project identified. Form PR-37, Project Status Record, must be prepared for each project as required by Volume 22, Chapter V, Administrative Manual. Attach a copy of the modified agreement to each PR-37.

5. Assurances of Adequate Relocation Assistance Program

a. No State highway department shall be authorized to proceed with any phase of any project which will cause the displacement of any person or any construction project concerning any right-of-way acquired by the State without Federal participation and coming within the provisions of paragraph 2b(3) above, until it has furnished satisfactory assurances to the extent State law permits, that:

(1) Relocation payments and services were or will be provided as set forth in paragraphs 6-10 of this memorandum.

(2) In the event housing available to persons without regard to race, color, religion or national origin will not be available within a reasonable period of time prior to displacement as provided in paragraph 7 of this memorandum, the State shall provide a detailed statement specifying the respects in which such assurance cannot be furnished, the extent to which such housing will be available prior to displacement, the period of time prior to displacement when that housing will become available and an estimate of the additional time within which such housing will become available to the extent that it can be reasonably accomplished.

Appendix B

(3) The public was or will be adequately informed of the relocation payments and services which will be available, as set forth in paragraph 12 of this memorandum.

(4) No person lawfully occupying the real property shall be required to move from his home, farm or business location without at least 90 days written notice of the intended vacation date from the State or political subdivision having responsibility for such acquisition. This provision must be carried out to the maximum extent practicable and exceptions should be made only in the case of very unusual conditions. Such assurance can be furnished on a Statewide basis or set forth in Point 31 of the State's statement of organization and procedures.

(5) The State's relocation program is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing available to persons without regard to race, color, religion or national origin with minimum hardship on those affected.

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The state will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum.

c. The State's assurances shall be accompanied by a statement in which it specifies the provisions of this memorandum with which it is unable under its laws to comply in whole or in part. In the event a State maintains that it is legally unable to comply fully with one or more of the provisions of this memorandum, its statement shall be

supported by an opinion of the chief legal officer of the highway department in which he discusses the legal issues raised and cites reasons and authorities in support of his conclusion for each representation of legal inability to comply.

6. Administration of the Relocation Assistance Program

a. In order to prevent unnecessary expenses and duplication of functions, the State highway department may make relocation payments or provide relocation assistance or otherwise carry out the functions described in this memorandum by utilizing the facilities, personnel, and services of any other Federal, State, or local governmental agency having an established organization for conducting relocation assistance programs.

b. Where a State highway department elects to have the relocation payments and services required under this PPM administered by another Federal, State, or local agency, it shall enter into a written contract or agreement to that effect with the agency it selects. Such contract or agreement shall be subject to the approval of the division engineer and shall obligate the agency to perform the services and make the payments in accordance with Chapter 5 of Title 23, U.S.C., and the regulations and procedures of the Bureau of Public Roads. The contract shall also provide that the records required by paragraph 15 of this memorandum will be retained by the agency administering the relocation program for a period of not less than three years after payment of the final voucher with respect to the particular project, or that these records will be turned over to the

State highway department. In the event these records are turned over to the highway department, that department will retain them for a like period. These records shall be made available for inspection by representatives of the Federal Government at any reasonable hour. Where the contract is with a public agency administering another Federal grant program, the contract shall specify the financial responsibilities of each to finance the relocation program required by this memorandum.

c. The State highway department shall, under Point 31 of its policy and procedural statement, identify the office in the State highway department which has Statewide responsibility for implementing the relocation program, the director of that office, and the State agency which will administer the relocation program. It shall also include the estimated number and job titles of personnel in the State highway department and the State agency who have direct responsibility for providing relocating payments and services.

d. The organization and procedures of the State agency which administers the relocation program shall provide as a minimum that:

(1) Each right-of-way project shall have assigned to it one or more individuals whose primary responsibility is to provide relocation assistance. These individuals may have responsibility for more than one project where reasonable.

(2) A local subsidiary office will be established which is reasonably convenient to public transportation or within walking distance of each project when the division engineer determines, after consultation with the State, that the volume of work or the needs of the displaced persons are such

as to justify the establishment of such an office. These offices shall be open during hours convenient to the persons to be displaced, including at least one and preferably more evenings per week if necessary.

(3) Regardless of whether a local office is established, personal contact will be made with each person as defined in paragraph 17, to be displaced to explain the relocation payments and assistance which are available and to assist in completing any applications required. If such contact cannot be made, the State agency shall furnish documentation to show that reasonable efforts have been made to achieve this contact.

(4) Relocation officials shall maintain personal contact with and shall exchange information with other agencies rendering services useful to displaced persons. Such agencies include social welfare agencies, urban renewal agencies, redevelopment authorities, public housing authorities, the Federal Housing Administration, Veterans Administration and Small Business Administration. Personal contact shall also be maintained with local sources of information on private replacement properties, including real estate brokers, real estate boards, property managers, apartment owners and operators, and home building contractors. Subscriptions may be maintained for multiple listing services, apartment directory services, neighborhood and metropolitan newspapers, etc.

(5) The local relocation office shall maintain and provide:

(a) lists of replacement dwellings available to persons without regard to race, color, religion or national origin drawn from various sources, suitable in price, size and

condition for displaced persons to the extent they are available;

(b) current data for such costs as security deposits for utilities, damages, and leases, closing costs, typical down-payments, and interest rates and terms;

(c) maps showing the location of schools, parks, playgrounds, shopping and public transportation routes in the area, and

(d) schedules and costs of public transportation.

(6) Other recommended information to be provided by relocation offices includes copies of the State's brochure explaining its relocation program, local ordinances pertaining to housing, building codes, and open housing; FHA and VA booklets of information on inspecting and evaluating replacement housing; and consumer education literature on housing, shelter costs and family budgeting.

7. Development of Relocation Program Plan

The planning for the relocation program shall be accomplished in stages:

a. Conceptual Stage. A project will be considered to be in this stage until such time as the final location is approved. At this stage the tenant is not to be disturbed in any way. The cost incurred in connection with securing this information is chargeable to preliminary engineering. Prior to the completion of this stage and prior to the public hearing, the State shall make preliminary investigations which will furnish the following information for each of the various alternative locations given final consideration.

Appendix B

(1) Approximate number of individuals, families, businesses, farms, and nonprofit organizations that would be displaced.

(2) The probable availability of decent, safe, and sanitary replacement housing within the financial means of those displaced.

(3) The basis upon which the above findings were made and a statement relative thereto by the State to the Bureau of Public Roads.

b. Right-of-Way Acquisition and/or Construction Stage.

The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:

(1) The methods and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.

(2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons without regard to race, color, religion or national origin which is decent, safe, and sanitary, including type of building, state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13a), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

(3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:

(a) outline the various relocation problems disclosed by the above survey;

(b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;

(c) provide detailed information on concurrent displacement and relocation by other governmental agencies or private concerns;

(d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees.

(e) estimate the amount of leadtime required and demonstrate its adequency to carry out a timely, orderly and humane relocation program;

(f) assure no person lawfully occupying real property shall be required to move without at least 90 days written notice; and

(g) furnish the names of the agency or agencies, if other than the State, which will provide the relocation assistance including an analysis of their present workload and ability to perform and the estimated number and job titles of relocation personnel servicing the project.

9. Replacement Housing

a. General Provisions

In addition to other payments authorized by this memorandum, individuals and families displaced from dwellings on real property acquired for a Federal-aid project are en-

titled to supplementary payments in accordance with this paragraph. The State highway department or the agency administering the relocation program shall develop procedures to implement this paragraph, which shall be submitted to the division engineer for his approval. Such procedures shall be designed to assure that the availability of these payments is brought to the attention of all eligible persons as provided in paragraphs 6 and 12 of this memorandum.

* * * * *

c. Payment to owner-occupants displaced from dwellings who do not qualify for payments under 9(b) and individuals or families who are occupying rental or leased space.

In addition to the moving cost payments to which they are entitled under the provisions of paragraph 8c of this memorandum, owner-occupants who do not qualify for payment under paragraph 9b and tenants who are displaced by a highway project are entitled to the following payments if they have lawfully occupied the dwelling taken for at least 90 days prior to the initiation of negotiations for such property.

(1) An individual or family renting a dwelling unit taken for a project is entitled to a payment to enable him to rent or purchase decent, safe, and sanitary housing. The amount of the payment shall be determined by subtracting 24 times the amount which the displaced individual or family paid in rent for the last month immediately before being required to move, or 24 times the economic rent as established by the State's appraisal process for his dwelling unit, whichever is the lesser, from the amount necessary to rent a decent, safe, and sanitary dwelling for the next two years, but in no event shall this amount exceed $1,500. Where rent

is being paid to a State or political subdivision thereof economic rent shall be used in determining the amount of payment to which the relocatee is entitled.

(2) An owner-occupant who is not eligible for payment because he had not actually owned and occupied his dwelling for at least one year prior to the initiation of the negotiation for the acquisition of that property by the State or has elected not to purchase a new property shall be entitled to the following payment: A sum equal to the difference, if any, between the cost of renting for the next two years a decent, safe, and sanitary dwelling adequate to accommodate him and his family in an area not generally less desirable in regard to public utilities and commercial facilities than the area from which he was displaced and 12 percent of the acquisition price of the property taken, but in no event may this payment exceed $1,500 or the amount which the owner-occupant would have received had he been eligible for a payment under paragraph 9b, whichever is the lesser. This may be used as a rent supplement or for a downpayment on the purchase of a dwelling.

g. Hardship cases

In cases of extreme hardship or other similar extenuating circumstances, exceptions to the decent, safe, and sanitary characteristics of replacement housing may be permitted in particular cases and the displaced individual or family still qualify for a payment under this paragraph. Such exceptions will only be made with the written concurrence of the Regional Federal Highway Administrator.

11. Appeals

a. An applicant for a payment under paragraphs 8, 9, or 10 of this memorandum shall be notified promptly in

writing concerning his eligibility for the payment claimed; the amount, if any, he is entitled to receive; and the time and manner in which such payment will be made. Such notification shall also inform the applicant of his right to appeal and the procedures therefor, in the event the applicant is dissatisfied with the initial ruling on his application for such payments:

b. The head of the State agency shall establish procedures, consistent with the applicable State law, for reviewing appeals under this memorandum. Those procedures shall provide, at the minimum, that any person taking such an appeal shall be given (1) full opportunity to be heard and (2) a prompt decision giving reasons in support of the result reached.

c. The State highway department shall submit to the division engineer under Point 31 of its policy and procedural statement the procedure which has been established for review of determinations under paragraphs 8, 9, and 10 of this memorandum.

12. PUBLIC INFORMATION

In order to assure that the public has adequate knowledge of the relocation program, the State highway department shall include with requests for authorizations to proceed on projects causing displacement a statement that it has or will take the following steps:

a. The relocation program described in paragraphs 6 through 11 of this memorandum has been discussed at all public hearings required by 23 U. S. Code 128 and the PPB's implementing that section. The State shall prepare a brochure describing its relocation program and distribute

the same without cost at all public hearings and to all other individuals and organizations as appropriate. The brochure shall state where copies of any State regulations implementing the relocation assistance program can be obtained:

b. The State agency shall provide full and adequate public notice of the relocation payments to be made and services to be rendered. Such public notice shall include the utilization of local newspapers, radio, and television stations (with particular emphasis on those which are read or listened to by the residents on the project) and local meetings for dissemination of news releases, advertisements, announcements and the like.

c. The State agency shall prepare and furnish each individual, family, business, and farm operator to be displaced by the project a written description of the (1) location assistance payments and services available; (2) the eligibility requirements and procedures for obtaining these payments and services; and (3) the right to appeal and procedure for appealing to the head of the State agency or the official designated to act for him. The above information shall be furnished by means of personal contact with those to be displaced unless an alternative method is approved by the division engineer. This information shall be furnished simultaneously with the initiation of negotiations for the property involved, and to tenants not later than 15 days after a contract for the purchase of property involved has been entered into. In no event shall such notice be less than 90 days prior to the date the tenant will be required to move. The individual furnishing this information shall document the file to that effect.

Appendix B

13. Standards for Decent, Safe and Sanitary Housing

a. A decent, safe, and sanitary dwelling is one which meets all of the following minimum requirements:

(1) Conforms with all applicable provisions for existing structures that have been established under State or local building, plumbing, electrical, housing and occupancy codes and similar ordinances or regulations applicable to the property in question.

(2) Has a continuing and adequate supply of potable safe water.

(3) Has a kitchen or an area set aside for kitchen use which contains a sink in good working condition and connected to hot and cold water, and a sewage disposal system. A stove and refrigerator in good operating condition shall be provided when required by local codes, ordinances or custom. When these facilities are not so required by local codes, ordinances, or custom the kitchen area or area set aside for such use shall have utility service connections and adequate space for the installation of such facilities.

(4) Has an adequate heating system in good working order which will maintain a minimum temperature of 70 degrees in the living area under local outdoor design temperature conditions. A heating system will not be required in those geographical areas where such is not normally included in new housing.

(5) Has a bathroom, well lighted and ventilated and affording privacy to a person within it, containing a lavatory basin and a bathtub or stall shower, properly connected to an adequate supply of hot and cold running

water, and a flush water closet, all in good working order and properly connected to a sewage disposal system.

(6) Has provision for artificial lighting for each room.

(7) Is structurally sound, in good repair and adequately maintained.

(8) Each building used for dwelling purposes shall have two safe unobstructed means of egress leading to safe open space at ground level. Each dwelling unit in a multi-dwelling building must have access either directly or through a common corridor to two means of egress to open space at ground level. In buildings of three stories or more, the common corridor on each story must have at least two means of egress.

(9) Has 150 square feet of habitable floor space for the first occupant in a standard living unit and at least 100 square feet of habitable floor space for each additional occupant. The floor space is to be subdivided into sufficient rooms to be adequate for the family. All rooms must be adequately ventilated. Habitable floor space is defined as that space used for sleeping, living, cooking or dining purposes, and excludes such enclosed places as closets, pantries, bath or toilet rooms, service rooms, connecting corridors, laundries, and unfinished attics, foyers, storage spaces, cellars, utility rooms and similar spaces.

b. Rental of sleeping rooms. The standards for decent, safe, and sanitary housing as applied to the rental of sleeping rooms shall include the minimum requirements contained in subparagraphs a(1), (4), (6), (7) and (8) of this paragraph and the following:

Appendix B

(1) At least 100 square feet of habitable floor space for the first occupant and 50 square feet of habitable floor space for each additional occupant.

(2) Lavatory and toilet facilities that provide privacy including a door that can be locked if such facilities are separate from the room.

(c) In lieu of the standards listed in this paragraph the agency providing the relocation assistance described in the PPM may submit for approval by the Director of Public Roads a local housing code by means of which the decent, safe, and sanitary nature of replacement housing for a project is to be judged. Any code so submitted shall be reasonably comparable to the list of standards incorporated in this paragraph.

d. The Director of Public Roads may approve exceptions to the standards in this paragraph where unusual conditions exist.

17. DEFINITIONS

As used in this PPM

* * * * *

c. *Displaced Person*

The term "displaced person" means any person who moves from real property on or after the effective date of this memorandum as a result of the acquisition or reasonable expectation of acquisition of such real property which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway or other real property on which such person conducts a business or farm operation. A person who moves

from real property which is subsequently acquired for a Federal-aid highway as a result of the "reasonable expectation of acquisition of such real property" is one who moves from such property (1) after notification by the State highway department that the property is to be acquired for a project, or after the location of the highway has been definitely established and approved by the Bureau of Public Roads and (2) within 12 months before the property is scheduled to be taken by the State;

* * * * *

f. *Federal Agency*

The term "Federal agency" means any department, agency or instrumentality in the executive branch of the government and any corporation wholly owned by the government.

g. *State Agency*

The term "State agency" means a State highway department or any agency designated by a State highway department to administer the relocation assistance program authorized by Chapter 5, Title 23, U.S.C.

h. *Displacement*

The vacating by the eligible person of real property after the happening of any one of the following events shall be deemed to be a displacement as a result of the acquisition or clearance of right-of-way for or construction of a Federal-aid highway project:

(1) The State highway department or political subdivision becomes entitled to possession of the real property

pursuant to an agreement or a court order in a condemnation proceeding instituted for the purpose of acquiring title.

(2) Title to the real property is conveyed to the State highway department or political subdivision by the owner thereof.

(3) A binding contract for the purchase of the real property is entered into by the State highway department or political subdivision and the owner of such real property, if the real property is not occupied by another eligible person prior to acquisition of title or right of possession.

(4) Public Roads authorizes the State to proceed with the relocation prior to actual acquisition of title or possession of the real property by the State highway department, or political subdivision.

(5) Any other move from real property subsequently acquired for a Federal-aid highway, which takes place as a result of the reasonable expectation that the property will be acquired for the highway, shall be deemed a displacement caused by the highway project for purposes of this PPM.

* * * * *

Appendix B

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

December 26, 1968

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM: J. A. Swanson, Director of Right-of-Way and
34–10 Location Washington, D. C. s/ John A. Swanson

SUBJECT: Relocation Procedures

A question has arisen as to whether it is necessary for a State to furnish all of the information required by paragraph 7b of IM 80-1-68 if the State's legal opinion and assurances indicate that the State cannot under present State law conform to the requirements of the 1968 Act relative to making replacement housing payments to enable displaced persons to move into decent, safe and sanitary housing.

Under such circumstances the State cannot reasonably be expected to furnish all of the information required by paragraph 7b. The State should, however, survey the available housing and have information relative thereto accessible to the relocatees in accordance with the requirements of paragraph 6d(5). Under paragraph 7b(3) the division engineer should insist that the State furnish an analysis of the relocation problems and possible solutions in sufficient detail to enable him to determine the advisability of

proceeding with the project and to assure that no relocatee will be required to move unless there is satisfactory replacement housing available to him. The State should, of course, make every effort that it can under existing law to see that the displacee is relocated in decent, safe and santitary housing.

When he is satisfied that conditions exist which will result in fair and equitable treatment of the relocatees the division engineer may authorize negotiations and/or construction even though the State cannot make the payments to place the relocatees in decent, safe and sanitary housing.

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U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

February 12, 1969

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM: J. A. Swanson, Director of Right-of-Way and
34–10 Location Washington, D. C. s/ John A. Swanson

SUBJECT: Relocation Procedures—Going Projects

Paragraphs 2 (b) (2) and (3) of IM 80-1-68 state that its provisions are applicable to all active Federal-aid projects and to all other active projects upon which the State later intends to construct a Federal-aid project where there remain individuals families, businesses, farm operations, and non-profit organizations which will be displaced.

In accomplishing the planning for the relocation program required under paragraph 7, the State should undertake such planning on all active projects to the extent that it is reasonable and proper. Each such project undoubtedly will involve a different set of circumstances and conditions. It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any additional authorizations to acquire right-of-way or to authorize construction on a project for which right of way was acquired after August 23, 1968, irrespective of the source of funds utilized for such acquisition, to assure

himself that the State has or will make the necessary relocations without undue hardship to the relocatees. If a major portion of the relocations have previously been accomplished very little good would result from going through the conceptual stage study. However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b. Some variation may be permitted by the division engineer when the circumstances warrant.

It should always be borne in mind that regardless of the information furnished at this stage of the project it is the responsibility of the State to furnish relocation assistance, and payments where authorized by State law, in accordance with the requirements of the law and the Im. At no time should a relocatee be forced into housing less desirable than that from which he was required to move and to the extent possible under State law all relocations should be made to decent, safe and sanitary dwellings.

Appendix B

MEMORANDUM

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

Date: January 15, 1970

SUBJECT: Implementation of Replacement Housing Policy

FROM : The Secretary

TO : Commandant, United States Coast Guard
Federal Aviation Administrator
Federal Highway Administrator
Federal Railroad Administrator
Urban Mass Transportation Administrator

I have reviewed the procedures for implementation of the DOT replacement housing policy as submitted in response to my October 20, 1969, memorandum.

I find that some of the submissions should be improved to clearly emphasize and cover certain aspects of this new policy. Ordinarily I would request that the necessary changes be made and the procedures resubmitted to me for final approval. However, I consider this new policy so important that I am approving the procedures at this time so that you can make the necessary changes and place them into effect without delay. For your assistance in this regard, attached are copies of all of the proposed procedures submitted. The procedures for the Federal Railroad Administration are still being developed and will be provided other addresses by the Federal Railroad Administrator directly.

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Each of you should reexamine your proposed procedures and make any modifications or changes necessary to make certain that they emphasize and provide full and specific coverage of the following points:

1. Specific written assurances that adequate replacement housing will be available or provided for (built, if necessary) will be required before the *initial* approval or endorsement of any project.

2. Construction will be authorized only upon verification that replacement housing is in place and has been made available to all affected persons.

3. All replacement housing must be fair housing—open to all persons regardless of race, color, religion, sex or national origin. This is in addition to the requirement that replacement housing must be offered all affected persons regardless of their race, color, religion, sex or national origin. Coverage of these two points is consistent with the requirements of Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964.

Copies of your final procedures to implement this policy should be submitted to the Department Director of Civil Rights as soon as possible.

/s/ JOHN VOLPE

Attachments

Appendix B

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

April 10, 1970

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers

FROM : John A. Swanson, Associate Director
34—10 for Right-of-Way and Location
Washington, D.C.

SUBJECT: Relocation Assistance—Availability of Replacement Housing (Supersedes White Circular Memorandum dated March 27, 1970)

This memorandum is applicable to the following:

a. All Federal-aid or any other highway projects financed in whole or in part with Federal-aid highway funds or other Federal funds authorized on or after May 1, 1970, involving rights-of-way which are occupied by an individual or family.

b. All Federal-aid or any other highway project financed in whole or in part with Federal-aid highway funds or other Federal funds authorized prior to May 1, 1970, on which individuals or families are still to be displaced as of May 1, 1970.

The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how

performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

Such replacement housing shall be:

a. Fair housing—open to all persons regardless of race, color, religion, sex, or national origin.

b. In areas not generally less desirable in regard to:

1. Public utilities

2. Public and commercial facilities

c. Available at rents or prices within the financial means of the families and individuals displaced.

d. Decent, safe and sanitary.

e. Reasonably accessible to the displacees' places of employment.

f. Adequate to accommodate the displacee.

The applicable PPM's and IM's are being revised to conform to the above policy.

Appendix B

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

Date, November 6, 1970

SUBJECT: Interstate Highway 77—Triangle area
Charleston, West Virginia

FROM : Under Secretary of Transportation

To : Federal Highway Administrator

The Secretary has reviewed this subject matter in depth and has determined that the FHWA approval of the Department of Highways location of I-77 within the Triangle Area is reaffirmed subject to the understanding, as regards the segment from Elk River to the Pennsylvania Railroad that:

(1) Appropriate steps have been taken and will continue to insure that all relocation resources are available to the relocatees on a fair housing basis.

(2) Every effort will be made through coordination with the Charleston Urban Redevelopment Authority and its HUD financed programs to assist in low-income rental housing being available beyond the end of the 2-year rent supplement period, provided by the highway program.

(3) Further construction involving the Triangle Area will be authorized only after the people now living within the right-of-way in that area have been relocated

into adequate decent, safe and sanitary housing, in accordance with DOT Order 5620.1.

(4) A continuous elevated viaduct design will be employed from Elk River to Capitol Street, suitable to the development of other land uses underneath and adjacent to the viaduct.

(5) Future use of land adjacent to and underneath the Interstate highway will be coordinated with local and State officials and the Charleston Urban Redevelopment Authority for the enhancement of the proposed urban redevelopment projects including commercial enterprises between Elk River and Capitol Street.

Subject to the above-listed understanding, projects now under suspension may be reactivated and you may authorize resumption of planning and design activities of various phases of work which are necessary to expedite construction. The demolition of buildings in the Triangle Area in order to prevent vandalism, occupation by squatters, and in the interest of public health, may be authorized at the discretion of the Division Engineer as the relocation of persons is accomplished.

You are asked to make immediate contact with the Department of Housing and Urban Development to insure full coordination and a minimum of delay in concurrent advancement of its programs for redevelopment of the Triangle Area.

/s/ JAMES M. BEGGS
James M. Beggs

APPENDIX C

Legislative History of 1968 Relocation Amendments to Federal-Aid Highway Act

The 1968 relocation amendments to the Federal-Aid Highway Act resulted from a decade of efforts "to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."[1] The background and history of this effort demonstrates that the amendments were designed to remedy a serious national wrong.

In 1962, President Kennedy recommended to Congress that a relocation program of the type required under urban renewal law[2] be extended to the Federal-Aid Highway program.[3] The response to the recommendation, 23 U.S.C.

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[1] 23 U.S.C. §501. The Senate report on the legislation noted:

> The problem of providing adequate relocation assistance to those persons . . . displaced by highway construction on the Federal-Aid system has long been a subject of the committee's attention.

1968 U.S. Code Cong. Ad. News 3487.

In support of a relocation bill proposed in 1957, one year after the first Federal-Aid Highway Act, Senator Javits said:

> It is our aim to ease in every way the burdens of moderate and low income families which are most frequently displaced . . . as a result of major public improvements in which the United States participates. . . . We should do everything we can toward this objective of humanitarianism and justice.

103 Cong. Rec. 5316-7 (1957).

[2] See 42 U.S.C. §1465.

[3] *The Transportation System of Our Nation*, Message to Congress, April 5, 1962, House Document No. 384.

§133[4] required assurances of "relocation advisory assistance" and authorized the payment of minimal relocation assistance to dislocatees.[5] Significantly, Congress limited the applicability of those requirements to projects approved after the effective date of the act,[6] a limitation not found in the 1968 act.

The inadequacies of the 1962 act soon became manifest[7] and the ever-increasing human disruption caused by highway displacement was emphasized for Congress by three successive government studies. Each pointed out the hardships created by the lack of sufficient relocation housing and assistance, and each called for the kind of remedial action which the 1968 amendments provide.

The first was the work of a select subcommittee of the House Committee on Public Works.[8] Its central findings confirmed that displacement caused by federally assisted programs severely disadvantaged the poor and minority groups:

> Most displacements affect low- or moderate-income families or individuals, for whom a forced move is a

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[4] Repealed by the 1968 law, Pub. L. 90-495 §37.

[5] Limited to $200 for individuals or families and $3000 for businesses, 23 U.S.C. §133 (d).

[6] 23 U.S.C. §133 (e), Br. App. 2, *supra*.

[7] In the words of Judge Sobeloff: "The cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal." App. 74a, 429 F.2d at 424. The one case construing §133 held, not surprisingly, that its requirement of advisory assistance does not compel the state to provide actual housing. *Small* v. *Ives*, 296 F. Supp. 448, 455 (D. Conn. 1968) (3-judge court).

[8] Select Committee on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, 88th Cong., 2nd Sess. (1964). (Committee Print No. 31.)

> very difficult experience. The problem is aggravated for the elderly, the large family, and the nonwhite displacee. The lack of standard housing at prices or rents that low- or moderate-income families can afford is the most serious relocation problem.[9]

The committee's findings were confirmed in a report of the Advisory Commission on Intergovernmental Relations[10] which further emphasized that the burdens of displacement fall unevenly on the poor and nonwhite. A principle problem which it noted was the absence of a requirement that the State officials provide assurances of "a 'feasible method' of relocating families and individuals and an adequate supply of standard housing available." [11] It also emphasized the necessity of intelligent planning for relocation needs, but noted that:

> even with advance planning as an essential part of an overall system of minimizing the hardships of displacement, it seems that, at least in the bigger, older, more congested cities, containing the underprivileged, elderly, and non-white particularly, positive measures of relocation assistance and service are indispensable.[12]

The report found that the most serious problems in relocation were the shortage of housing for low income groups and the special burdens found by non-whites, the elderly,

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[9] *Id.* at 106.

[10] Advisory Commission Intergovernmental Relations, *Relocation: Unequal Treatment of People and Businesses Displaced by Government* (1965).

[11] *Id.* at 74-75.

[12] *Id.* at 76.

and those with large families in urban areas.[13] It recommended that the states be required to assure in advance the necessary number of proper housing units to meet the needs of displacees.[14]

In response, the Congress in 1966 ordered the Secretary of Commerce, the department then in charge of highway programs, to make a detailed report of relocation problems and recommended solutions; to be submitted no later than July 1, 1967.[15] The report of the Senate Committee on Publics Works which accompanied the 1966 highway act stated that the operation of 23 U.S.C. §133 "has not been fully satisfactory and effective . . ." The report further expressed the Committee's concern that "the situation has worsened as construction of the Interstate System has moved into heavily developed urban areas."[16] The resulting study, issued by the Secretary of Transportation,[17] restated the problems which were already well known, and urged prompt federal action.[18]

The decade of reform efforts resulted in the relocation provisions of the Federal Aid Highway Act of 1968, 23

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[13] *Id.* at 104-105.

[14] *Id.* at 114-117.

[15] Pub. L. 89-574, §12, Sept. 13, 1966, 80 Stat. 770, *supra* at Br. App. 2-3.

[16] 1966 U.S. Code Cong. & Ad. News 3043-4.

[17] Highway Relocation Assistance Study, 90th Cong., 1st Sess. (1967). (Committee Print No. 9.)

[18] The urgency of federal action was underscored by the projection that between July 1, 1967, and June 30, 1970, 146,950 residential units would be displaced by federally aided highway construction while most of the right of way for the interstate system will have been acquired (although not necessarily cleared) by June 30, 1970. *Id.* at 41. *Cf.* 1968 U.S. Code Cong. & Ad. News 3512.

Appendix C

U.S.C, §501 *et seq.* The committee reports, floor debate, and language of the 1968 amendments all confirm what the history of the previous decade showed—that the relocation amendments were truly "remedial," and their immediate implementation was urgent. During debate on the Federal-Aid Highway Act of 1968, the importance of adequate relocation was continually restated. The relationship of highway displacement to urban unrest was very much in the forefront of Congressional concern. The principal sponsor of the 1968 Act, Senator Jennings Randolph,[19] spoke of the urgent need for a comprehensive highway relocation program:

> Today we are in an urban society . . . These dislocations and displacements caused by urban highways have been the source of much of the discontent and unrest in our cities.[20]

As Senator Randolph continued, immediate action was imperative:

> We cannot wait any longer for this program. There is an urgency about it. I think it is imperative that we move.[21]

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[19] Senator Randolph is from West Virginia, and was undoubtedly aware of the relocation problems in his home state which had already become apparent at the time he spoke.

[20] 114 Cong. Rec. 8037.

[21] *Id.* at 8038. The Senate Report on this act points out:

> The evidence showed also that, because urban interstate highways often go through rundown, dilapidated, low-income or so-called disadvantaged areas, those persons least able to afford dislocation are frequently the ones who are forced to move by our highway programs.

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The language of the Act itself makes clear its remedial and urgent nature. Its "Declaration of Policy," states that the "prompt and equitable relocation" of persons displaced by federal highway construction

> is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.[22]

The Act was declared effective and fully operative on the date of its enactment.[23]

In the face of this legislative history and the requirements of the Act itself, a response to the well documented need for relocation reform to alleviate the human misery and social unrest caused by previous highway displacement, any interpretation which prevents the immediate effective implementation of the Act for the benefit of those who had not yet been moved from their homes at the time of its enactment ought to be soundly rejected.

In this regard it was pointed out that often when persons are displaced from these areas there is no housing or replacement property available for their relocation. People are thus forced to move, but have no place to go; or if other housing or replacement property does exist, it is usually well beyond their financial capabilities. The evidence shows clearly that there is a definite need for procedures which provide for comparable replacement housing and property at the time such displacement occurs.

1968 U.S. Code Cong. & Ad. News 3488. *Cf. id*, at 3512.

[22] 23 U.S.C. §501, Br. App.

[23] Pub. L. 90-495 §37, Aug. 23, 1968, 82 Stat. 831. The one limiting feature in the act provides that until July 1, 1970, it "shall be applicable to a state only to the extent that such state is able under its laws to comply . . ." *Ibid.* Even here, this law was more definite than the earlier one, which a state could avoid completely by failing to enact enabling legislation. 23 U.S.C. §133 (c). Here the states were obliged to conform their laws, if needed, by July 1, 1970, or risk losing the benefits of federal assistance.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 26 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, *et al.*,
Petitioners,

—v.—

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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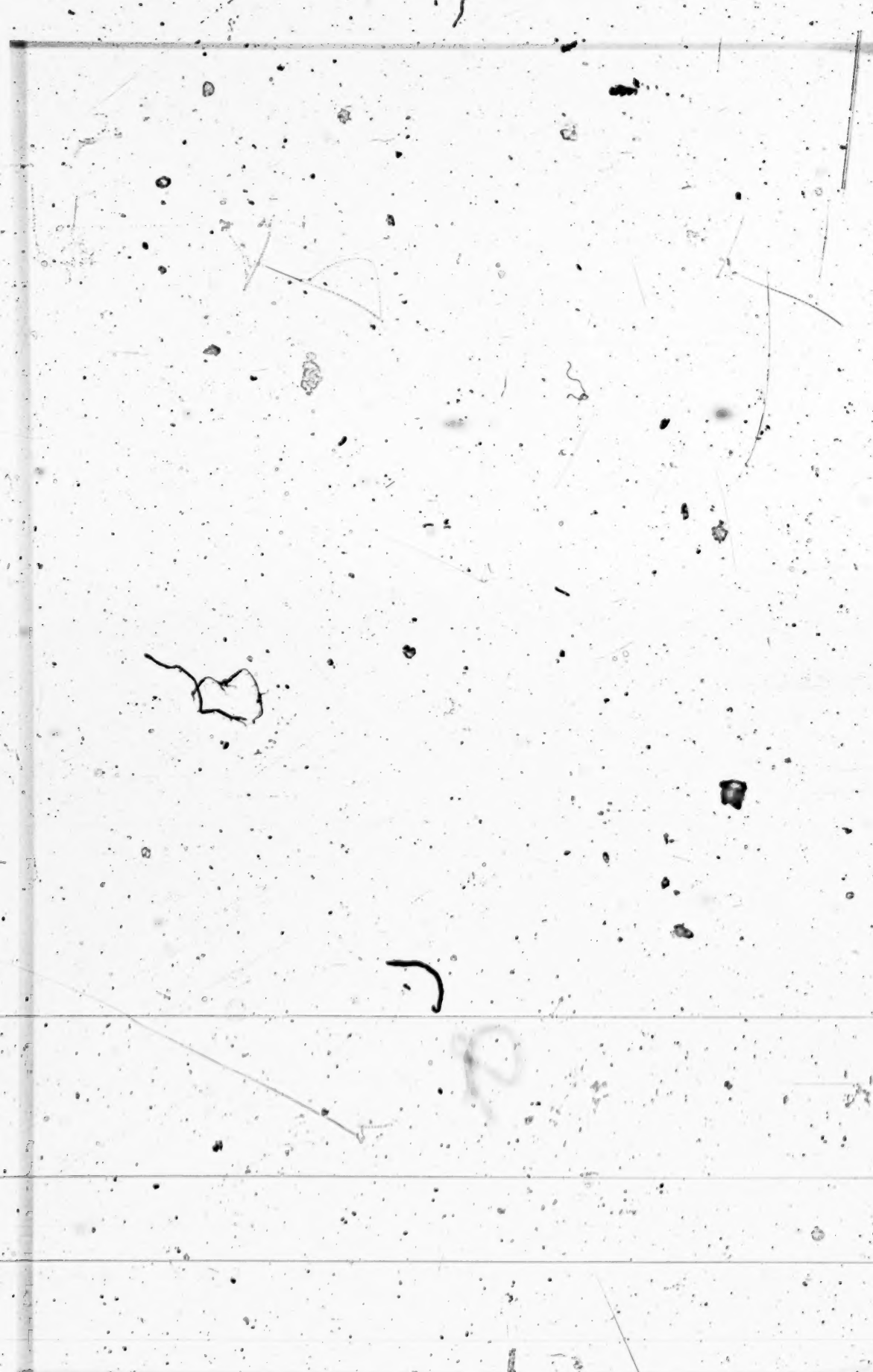

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners file this supplemental brief pursuant to Rule 41(5) of the Rules of this Court for the purpose of discussing the impact on this case of the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970"[1] a statute not available in time to have been included in the brief in chief previously filed.[2]

Like the relocation provisions of the 1968 Federal-Aid Highway Act,[3] the Uniform Relocation Act is the culmina-

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[1] Pub. L. 91-646, January 2, 1971, 84 Stat. 1894. (Hereinafter "Uniform Relocation Act.") The entire statute appears as an appendix to this brief.

[2] Although the statute was enacted January 2, 1971, petitioners did not learn of its enactment and obtain a copy of it until after their brief had been prepared and filed.

[3] The legislative history of the 1968 statute is discussed at Br. App. 47-52.

tion of many years of demonstrated Congressional concern for the deprivations rendered to those whose homes are destroyed by federal or federally-assisted projects, and represents an effort to insure that "...ch persons shall not suffer disproportionate injuries as a result of progress designed for the benefit of the public as a whole."[4] In this statute, Congress has dealt comprehensively with the problem, in requirements applicable to all federal programs, of whatever nature, which cause displacement. The statute, made effective on the date of its enactment,[5] repeals and replaces the various existing statutes dealing with relocation, including those of the 1968 highway act.[6]

The Uniform Relocation Act expands the requirements of the prior statute in several respects,[7] and in important areas effectively adopts petitioners' interpretation of the

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[4] Uniform Relocation Act, §201. Substantially identical language appears in the declaration of policy of the Highway Relocation Amendments, 23 U.S.C. §501.

[5] Sec. 221(a). This contrasts with earlier versions of the statute which delayed enactment for one year, (H.R. 14898, 91st Cong., 1st Sess., §204 (1969)), or one hundred and eighty days. (S. 1, 91st Cong. 1st Sess. §253(a) (1969)), and indicates recognition of the urgency of the problem.

[6] Sec. 220(a)(10) and (11).

[7] The monetary payments to displacees are substantially increased: moving expense allowances to $300 from $200, dislocation allowance to $200 from $100; compare §202(b) with 23 U.S.C. §505(b), replacement housing payment for homeowners to $15000 from $5000, compare §203(a)(1) with 23 U.S.C. §506(a), and replacement housing payment to tenants to $4000 from $1500, compare §204 with 23 U.S.C. §506(b). A very important feature of the new law permits the federal agency to use a portion of the authorized funds for the project to provide housing for displacees where existing housing is not adequate to meet their needs, §206(a). This provision makes applicable to all federal programs the authorization contained in the Federal-Aid Highway Act of 1970, §117 (Br. App. 13-14; see Brief at 50-51 and 30 N. 71) enacted December 31, 1970, and repealed two days later by this Act.

1968 highway relocation amendments. Thus, instead of simply requiring "satisfactory assurances" from the State that replacement housing will be available before a project is approved, 23 U.S.C. §502, the new statute mandates that both the federal and state agencies develop during the planning stage of a project a "relocation assistance advisory program" which will determine the needs of those persons to be displaced and survey the existing housing available to meet those needs. §§205(c) and 210(2). In this manner, the new law makes the general concept of relocation planning, previously implied by the statute and required by regulation,[8] but not applied to the relocation of petitioners for the technical reasons discussed in the main brief,[9] a matter of explicit statutory command. We submit that in doing this, Congress has expressly determined that prior planning is essential to the protection of the rights of displacees. Significantly, the Act specifically mandates that no displacee be required to move from his dwelling until the federal administrator is satisfied that appropriate replacement housing is available to him, §206(b).[10] The statute by its terms protects all persons moved after its effective date, §101(b). It is therefore applicable to all persons moved after January 2, 1971, on the well established principle that a change in the law occurring while an appeal is pending will be applied by an appellate court to any case where the rights of the parties are not already fixed. *Thorpe* v. *Housing Authority*, 393 U.S. 268

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[8] See IM 80-1-68, ¶7, Br. App. 25-27.

[9] Brief at 32-35.

[10] Br. App. 43-44. The Act has thus adopted the Department of Transportation regulation of April 10, 1970, promulgated while this case was pending before the Court of Appeals, which petitioners have argued, *inter alia*, required reversal of the district court's decision. See Brief at 35-37.

(1969), *Bruner v. United States*, 343 U.S. 112 (1957); *Ex parte Collatt*, 337 U.S. 55 (1949); *Frye v. Celebrezze*, 365 F. 2d 865 (4th Cir. 1966).

While the Uniform Relocation Act repeals the relocation provisions of the Federal-Aid Highway Act, it specifically preserves all rights existing under the prior statute,[11] and of course has no effect on the constitutional claim in this case—that the black and poor petitioners are denied equal protection by the state action of displacing them into a racially discriminatory housing market with a shortage of low cost housing.[12] The claim made under the constitution and the former law remains applicable to the substantial number (over 200) of persons forced from their homes in the Triangle by the construction of Interstate I-77—many into demonstrably inadequate housing. They will continue to be denied the assurance of decent replacement housing which Congress intended them to have under the 1968 Act, for the reasons argued in the principle brief.

[11] "Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Acts or portions thereof under subsection (a) of this section. Sec. 220(b).

[12] Brief at 24-26.

CONCLUSION

For the foregoing reasons, and those discussed in the brief, the judgment below should be reversed and the case remanded with instructions that those of the petitioners already displaced be afforded the protections of the 1968 law and those remaining be given the benefits contained in the Uniform Act.

Respectfully submitted,

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Public Law 91-646
91st Congress, S. 1
January 2, 1971

An Act

84 STAT. 1894.

To provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal and federally assisted programs and to establish uniform and equitable land acquisition policies for Federal and federally assisted programs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970".

Uniform Relocation Assistance and Land Acquisition Policies Act of 1970.

TITLE I—GENERAL PROVISIONS

Definitions.

SEC. 101. As used in this Act—

(1) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government (except the National Capital Housing Authority), any wholly owned Government corporation (except the District of Columbia Redevelopment Land Agency), and the Architect of the Capitol, the Federal Reserve banks and branches thereof.

(2) The term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, the Trust Territory of the Pacific Islands, and any political subdivision thereof.

(3) The term "State agency" means the National Capital Housing Authority, the District of Columbia Redevelopment Land Agency, and any department, agency, or instrumentality of a State or of a political subdivision of a State, or any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States.

(4) The term "Federal financial assistance" means a grant, loan, or contribution provided by the United States, except any Federal guarantee or insurance and any annual payment or capital loan to the District of Columbia.

(5) The term "person" means any individual, partnership, corporation, or association.

(6) The term "displaced person" means any person who, on or after the effective date of this Act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 202(a) and (b) and 205 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily—

(A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public;

(C) by a nonprofit organization; or

(D) solely for the purposes of section 202(a) of this title, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display

or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(8) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(9) The term "mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of the State in which the real property is located, together with the credit instruments, if any, secured thereby.

EFFECT UPON PROPERTY ACQUISITION

SEC. 102. (a) The provisions of section 301 of title III of this Act create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.

(b) Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment of this Act.

TITLE II—UNIFORM RELOCATION ASSISTANCE

DECLARATION OF POLICY

SEC. 201. The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

MOVING AND RELATED EXPENSES

SEC. 202. (a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after the effective date of this Act, the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for—

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

(b) Any displaced person eligible for payments under subsection (a) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive a moving expense allowance, determined according to a schedule established by the head of the Federal agency, not to exceed $300; and a dislocation allowance of $200.

(c) Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall be not less than $2,500 nor more than $10,000. In the case of a business no payment shall be made under this subsection unless the head of the Federal agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as the head of such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period.

REPLACEMENT HOUSING FOR HOMEOWNER

SEC. 203. (a)(1) In addition to payments otherwise authorized by this title, the head of the Federal agency shall make an additional payment not in excess of $15,000 to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements:

(A) The amount, if any, which when added to the acquisition cost of the dwelling acquired by the Federal agency, equals the reasonable cost of a comparable replacement dwelling which is a decent, safe, and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and places of employment and available on the private market. All determinations required to carry out this subparagraph shall be made in accordance with standards established by the head of the Federal agency making the additional payment.

(B) The amount, if any, which will compensate such displaced person for any increased interest costs which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. Such amount shall be paid only if the dwelling acquired by the Federal agency was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than one hundred and eighty days prior to the initiation of negotiations for the acquisition of such dwelling. Such amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located.

((C) Reasonable expenses incurred by such displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(2) The additional payment authorized by this subsection shall be made only to such a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the one year period beginning on the date on which he receives from the Federal agency final payment of all costs of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date.

(b) The head of any Federal agency may, upon application by a mortgagee, insure any mortgage (including advances during construction) on a comparable replacement dwelling executed by a displaced person assisted under this section, which mortgage is eligible for insurance under any Federal law administered by such agency notwithstanding any requirements under such law relating to age, physical condition, or other personal characteristics of eligible mortgagors, and may make commitments for the insurance of such mortgage prior to the date of execution of the mortgage.

REPLACEMENT HOUSING FOR TENANTS AND CERTAIN OTHERS

SEC. 204. In addition to amounts otherwise authorized by this title, the head of the Federal agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 203 which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling. Such payment shall be either—

(1) the amount necessary to enable such displaced person to lease or rent for a period not to exceed four years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed $4,000, or

(2) the amount necessary to enable such person to make a downpayment (including incidental expenses described in section 203(a)(1)(C)) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed $4,000, except that if such amount exceeds $2,000, such person must equally match any such amount in excess of $2,000, in making the downpayment.

RELOCATION ASSISTANCE ADVISORY SERVICES

SEC. 205. (a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after the effective date of this section, the head of such agency shall provide a relocation assistance advisory program for displaced persons which shall offer the services described in subsection (c) of this section. If such agency head determines that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, he may offer such person relocation advisory services under such program.

(b) Federal agencies administering programs which may be of assistance to displaced persons covered by this Act shall cooperate to the maximum extent feasible with the Federal or State agency causing the displacement to assure that such displaced persons receive the maximum assistance available to them.

(c) Each relocation assistance advisory program required by subsection (a) of this section shall include such measures, facilities, or services as may be necessary or appropriate in order to—

(1) determine the need, if any, of displaced persons, for relocation assistance;

(2) provide current and continuing information on the availability, prices, and rentals, of comparable decent, safe, and sanitary sales and rental housing, and of comparable commercial properties and locations for displaced businesses;

(3) assure that, within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by such Federal agency head, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment, except that the head of that Federal agency may prescribe by regulation situations when such assurances may be waived;

(4) assist a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location;

(5) supply information concerning Federal and State housing programs, disaster loan programs, and other Federal or State programs offering assistance to displaced persons; and

(6) provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation.

(d) The heads of Federal agencies shall coordinate relocation activities with project work, and other planned or proposed governmental actions in the community or nearby areas which may affect the carrying out of relocation assistance programs.

HOUSING REPLACEMENT BY FEDERAL AGENCY AS LAST RESORT

SEC. 206. (a) If a Federal project cannot proceed to actual construction because comparable replacement sale or rental housing is not available, and the head of the Federal agency determines that such housing cannot otherwise be made available he may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project.

(b) No person shall be required to move from his dwelling on or after the effective date of this title, on account of any Federal project, unless the Federal agency head is satisfied that replacement housing, in accordance with section 205(c)(3), is available to such person.

STATE REQUIRED TO FURNISH REAL PROPERTY INCIDENT TO FEDERAL ASSISTANCE (LOCAL COOPERATION)

SEC. 207. Whenever real property is acquired by a State agency and furnished as a required contribution incident to a Federal program or project, the Federal agency having authority over the pro-

gram or project may not accept such property unless such State agency has made all payments and provided all assistance and assurances, as are required of a State agency by sections 210 and 305 of this Act. Such State agency shall pay the cost of such requirements in the same manner and to the same extent as the real property acquired for such project, except that in the case of any real property acquisition or displacement occurring prior to July 1, 1972, such Federal agency shall pay 100 per centum of the first $25,000 of the cost of providing such payments and assistance.

STATE ACTING AS AGENT FOR FEDERAL PROGRAM

SEC. 208. Whenever real property is acquired by a State agency at the request of a Federal agency for a Federal program or project, such acquisition shall, for the purposes of this Act, be deemed an acquisition by the Federal agency having authority over such program or project.

PUBLIC WORKS PROGRAMS AND PROJECTS OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA AND OF THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

SEC. 209. Whenever real property is acquired by the government of the District of Columbia or the Washington Metropolitan Area Transit Authority for a program or project which is not subject to sections 210 and 211 of this title, and such acquisition will result in the displacement of any person on or after the effective date of this Act, the Commissioner of the District of Columbia or the Washington Metropolitan Area Transit Authority, as the case may be, shall make all relocation payments and provide all assistance required of a Federal agency by this Act. Whenever real property is acquired for such a program or project on or after such effective date, such Commissioner or Authority, as the case may be, shall make all payments and meet all requirements prescribed for a Federal agency by title III of this Act.

REQUIREMENTS FOR RELOCATION PAYMENTS AND ASSISTANCE OF FEDERALLY ASSISTED PROGRAM; ASSURANCES OF AVAILABILITY OF HOUSING

SEC. 210. Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such State agency that—

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 of this title;

(2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;

(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205(c)(3).

FEDERAL SHARE OF COSTS

SEC. 211. (a) The cost to a State agency of providing payments and assistance pursuant to sections 206, 210, 215, and 305, shall be included as part of the cost of a program or project for which Federal financial assistance is available to such State agency, and such State agency shall be eligible for Federal financial assistance with respect to such payments and assistance in the same manner and to the same extent as other program or project costs, except that, notwithstanding any other law in the case where the Federal financial assistance is by grant or contribution the Federal agency shall pay the full amount of the first $25,000 of the cost to a State agency of providing payments and assistance for a displaced person under sections 206, 210, 215, and 305, on account of any acquisition or displacement occurring prior to July 1, 1972, and in any case where such Federal financial assistance is by loan, the Federal agency shall loan such State agency the full amount of the first $25,000 of such cost.

(b) No payment or assistance under section 210 or 305 shall be required or included as a program or project cost under this section, if the displaced person receives a payment required by the State law of eminent domain which is determined by such Federal agency head to have substantially the same purpose and effect as such payment under this section, and to be part of the cost of the program or project for which Federal financial assistance is available.

(c) Any grant to, or contract or agreement with, a State agency executed before the effective date of this title, under which Federal financial assistance is available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this Act, shall be amended to include the cost of providing payments and services under sections 210 and 305. If the head of a Federal agency determines that it is necessary for the expeditious completion of a program or project he may advance to the State agency the Federal share of the cost of any payments or assistance by such State agency pursuant to sections 206, 210, 215, and 305.

ADMINISTRATION—RELOCATION ASSISTANCE IN PROGRAMS RECEIVING FEDERAL FINANCIAL ASSISTANCE

SEC. 212. In order to prevent unnecessary expenses and duplications of functions, and to promote uniform and effective administration of relocation assistance programs for displaced persons under sections 206, 210, and 215 of this title, a State agency may enter into contracts with any individual, firm, association, or corporation for services in connection with such programs, or may carry out its functions under this title through any Federal or State governmental agency or instrumentality having an established organization for conducting relocation assistance programs. Such State agency shall, in carrying out the relocation assistance activities described in section 206, whenever practicable, utilize the services of State or local housing agencies, or other agencies having experience in the administration or conduct of similar housing assistance activities.

REGULATIONS AND PROCEDURES

SEC. 213. (a) In order to promote uniform and effective administration of relocation assistance and land acquisition of State or local housing agencies, or other agencies having programs or projects by

Federal agencies or programs or projects by State agencies receiving Federal financial assistance, the heads of Federal agencies shall consult together on the establishment of regulations and procedures for the implementation of such programs.

(b) The head of each Federal agency is authorized to establish such regulations and procedures as he may determine to be necessary to assure—

(1) that the payments and assistance authorized by this Act shall be administered in a manner which is fair and reasonable, and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this title shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this Act, or the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency.

(c) The head of each Federal agency may prescribe such other regulations and procedures, consistent with the provisions of this Act, as he deems necessary or appropriate to carry out this Act.

ANNUAL REPORT

Presidential report to Congress.

SEC. 214. The head of each Federal agency shall prepare and submit an annual report to the President on the activities of such agency with respect to the programs and policies established or authorized by this Act, and the President shall submit such reports to the Congress not later than January 15 of each year, beginning January 15, 1972, and ending January 15, 1975, together with his comments or recommendations. Such reports shall give special attention to: (1) the effectiveness of the provisions of this Act assuring the availability of comparable replacement housing, which is decent, safe, and sanitary, for displaced homeowners and tenants; (2) actions taken by the agency to achieve the objectives of the policies of Congress, declared in this Act, to provide uniform and equal treatment, to the greatest extent practicable, for all persons displaced by, or having real property taken for, Federal or federally assisted programs; (3) the views of the Federal agency head on the progress made to achieve such objectives in the various programs conducted or administered by such agency, and among the Federal agencies; (4) any indicated effects of such programs and policies on the public; and (5) any recommendations he may have for further improvements in relocation assistance and land acquisition programs, policies, and implementing laws and regulations.

PLANNING AND OTHER PRELIMINARY EXPENSES FOR ADDITIONAL HOUSING

SEC. 215. In order to encourage and facilitate the construction or rehabilitation of housing to meet the needs of displaced persons who are displaced from dwellings because of any Federal or Federal financially assisted project, the head of the Federal agency administering such project is authorized to make loans as a part of the cost of any such project, or to approve loans as a part of the cost of any such project receiving Federal financial assistance, to nonprofit, limited

dividend, or cooperative organizations or to public bodies, for necessary and reasonable expenses prior to construction, for planning and obtaining federally insured mortgage financing for the rehabilitation or construction of housing for such displaced persons. Notwithstanding the preceding sentence, or any other law, such loans shall be available for not to exceed 80 per centum of the reasonable costs expected to be incurred in planning, and in obtaining financing for, such housing, prior to the availability of such financing, including, but not limited to, preliminary surveys and analyses of market needs, preliminary site engineering, preliminary architectural fees, site acquisition, application and mortgage commitment fees, and construction loan fees and discounts. Loans to an organization established for profit shall bear interest at a market rate established by the head of such Federal agency. All other loans shall be without interest. Such Federal agency head shall require repayment of loans made under this section, under such terms and conditions as he may require, upon completion of the project or sooner, and except in the case of a loan to an organization established for profit, may cancel any part or all of a loan if he determines that a permanent loan to finance the rehabilitation or the construction of such housing cannot be obtained in an amount adequate for repayment of such loan. Upon repayment of any such loan, the Federal share of the sum repaid shall be credited to the account from which such loan was made, unless the Secretary of the Treasury determines that such account is no longer in existence, in which case such sum shall be returned to the Treasury and credited to miscellaneous receipts.

PAYMENTS NOT TO BE CONSIDERED AS INCOME

SEC. 216. No payment received under this title shall be considered as income for the purposes of the Internal Revenue Code of 1954; or for the purposes of determining the eligibility or the extent of eligibility of any person for assistance under the Social Security Act or any other Federal law.

68A Stat. 3.
26 USC 1 et seq.
49 Stat. 620.
42 USC 1305.

DISPLACEMENT BY CODE ENFORCEMENT, REHABILITATION, AND DEMOLITION PROGRAMS RECEIVING FEDERAL ASSISTANCE.

SEC. 217. A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after the effective date of this Act, as a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall, for the purposes of this title, be deemed to have been displaced as the result of the acquisition of real property.

63 Stat. 414; 68 Stat. 622. 42 USC 1450 et seq. 80 Stat. 1255. 42 USC 3301 note.

TRANSFERS OF SURPLUS PROPERTY

SEC. 218. The Administrator of General Services is authorized to transfer to a State agency for the purpose of providing replacement housing required by this title, any real property surplus to the needs of the United States within the meaning of the Federal Property and Administrative Services Act of 1949, as amended. Such transfer shall be subject to such terms and conditions as the Administrator determines necessary to protect the interests of the United States and may be made without monetary consideration, except that such State agency shall pay to the United States all amounts received by such agency from any sale, lease, or other disposition of such property for such housing.

63 Stat. 377. 40 USC 471 note.

84 STAT. 1903

DISPLACEMENT BY A SPECIFIC PROGRAM

SEC. 219. Notwithstanding any other provision of this title, a person—

(1) who moves or discontinues his business, moves other personal property, or moves from his dwelling on or after January 1, 1969, and before the 90th day after the date of enactment of this Act as the result of the contemplated demolition of structures or the construction of improvements on real property acquired, in whole or in part, by a Federal agency within the area in New York, New York, bounded by Lexington and Third Avenues and 31st and 32d Streets; and

(2) who has lived on, or conducted a business on, such real property for at least one year prior to the date of enactment of this Act;

may be considered a displaced person for purposes of sections 202 (a) and (b), 204, and 205 of this title, by the head of the agency acquiring the real property if—

(A) the head of the agency determines that such person has suffered undue hardship as the result of displacement from the real property; and

(B) the Federal Government acquired and held such property for at least five years prior to the date of enactment of this Act.

REPEALS

SEC. 220. (a) The following laws and parts of laws are hereby repealed:

(1) The Act entitled "An Act to authorize the Secretary of the Interior to reimburse owners of lands required for development under his jurisdiction for their moving expenses, and for other purposes," approved May 29, 1958 (43 U.S.C. 1231-1234).

72 Stat. 152.

(2) Paragraph 14 of section 203(b) of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

76 Stat. 384.

76 Stat. 511.

(3) Section 2680 of title 10, United States Code.

(4) Section 7(b) of the Urban Mass Transportation Act of 1965 (49 U.S.C. 1606(b)).

78 Stat. 305.

78 Stat. 788.

(5) Section 114 of the Housing Act of 1949 (42 U.S.C. 1465).

(6) Paragraphs (7)(b)(iii) and (8) of section 15 of the United States Housing Act of 1937 (42 U.S.C. 1415, 1415(8)), except the first sentence of paragraph (8).

78 Stat. 795.

(7) Section 2 of the Act entitled "An Act to authorize the Commissioners of the District of Columbia to pay relocation costs made necessary by actions of the District of Columbia government, and for other purposes", approved October 6, 1964 (78 Stat. 1004; Public Law 88-629; D.C. Code 5-729).

(8) Section 404 of the Housing and Urban Development Act of 1965 (42 U.S.C. 3074).

79 Stat. 486.

(9) Sections 107 (b) and (c) of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3307).

80 Stat. 1259.

82 Stat. 830.

(10) Chapter 5 of title 23, United States Code.

23 USC 501.

(11) Sections 32 and 33 of the Federal-Aid Highway Act of 1968 (Public Law 90-495).

82 Stat. 835.

(b) Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Acts or portions thereof under subsection (a) of this section.

23 USC 501 note, 510 note.

EFFECTIVE DATE

SEC. 221. (a) Except as provided in subsections (b) and (c) of this section, this Act and the amendments made by this Act shall take effect on the date of its enactment.

(b) Until July 1, 1972, sections 210 and 305 shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. After July 1, 1972, such sections shall be completely applicable to all States.

(c) The repeals made by paragraphs (4), (5), (6), (8), (9), (10), (11), and (12) of section 220(a) of this title and section 306 of title III shall not apply to any State so long as sections 210 and 305 are not applicable in such State.

TITLE III—UNIFORM REAL PROPERTY ACQUISITION POLICY

UNIFORM POLICY ON REAL PROPERTY ACQUISITION PRACTICES

SEC. 301. In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 1 of the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a), for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by title II will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.

BUILDINGS, STRUCTURES, AND IMPROVEMENTS

SEC. 302. (a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the United States all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this subsection.

EXPENSES INCIDENTAL TO TRANSFER OF TITLE TO UNITED STATES

SEC. 303. The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier.

LITIGATION EXPENSES

SEC. 304. (a) The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.

(b) Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was instituted.

(c) The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of title 28, United States Code, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding. 62 Stat. 933; Ante, p. 449. 68 Stat. 1241.

REQUIREMENTS FOR UNIFORM LAND ACQUISITION POLICIES; PAYMENTS OF EXPENSES INCIDENTAL TO TRANSFER OF REAL PROPERTY TO STATE; PAYMENT OF LITIGATION EXPENSES IN CERTAIN CASES

SEC. 305. Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after the effective date of this title, unless he receives satisfactory assurances from such State agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 301 and the provisions of section 302, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 303 and 304.

REPEALS

79 Stat. 485.
82 Stat. 836.
74 Stat. 502.

SEC. 306. Sections 401, 402, and 403 of the Housing and Urban Development Act of 1965 (42 U.S.C. 3071–3073), section 35(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. 141) and section 301 of the Land Acquisition Policy Act of 1960 (33 U.S.C. 596) are hereby repealed. Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Act or portions thereof under this section.

Approved January 2, 1971

LEGISLATIVE HISTORY:

HOUSE REPORT No. 91-1656 (Comm. on Public Works).
SENATE REPORT No. 91-488 (Comm. on Government Operations).
CONGRESSIONAL RECORD:
Vol. 115 (1969): Oct. 23, 27 considered and passed Senate.
Vol. 116 (1970): Dec. 7, considered and passed House, amended.
Dec. 17, Senate agreed to House amendments with amendments.
Dec. 18, House concurred in Senate amendments.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, ET AL.,
Petitioners,

v.

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF STATE RESPONDENTS

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BRIEF OF STATE RESPONDENTS

INTRODUCTION

State Respondents[1] herein, is the vehicle through which the various and sundry mechanics for the re-

[1] For purposes of brevity and clarification, the Respondents, William S. Ritchie, Jr., Commissioner, etc., and O. R. Colan, Director, etc., will hereinafter be referred to as State Respondents. At the inception of subject litigation in December, 1968, M. R. Hamill was Commissioner, State Road Commission of West Virginia, and was replaced by said William S. Ritchie, Jr., and the District Court (A. 36a) substituted Mr. Ritchie as a named defendant pursuant to Rule 25(d) (1), F.R.C.P. Since the time of the opinion of the District Court, Mr. James E. Bailey has replaced Mr. O. R. Colan as Director of Right of Way Division, and the State Road Commission of West Virginia has been renamed by statute (Code 17-2A-1) as West Virginia Department of Highways, and its Chief Executive Officer, the West Virginia Commissioner of Highways.

location of individuals, individual families, businesses, farm operations and non-profit organizations displaced by federally-aided highway location and/or construction are carried out, in the Triangle area of the City of Charleston, as well as throughout the entire State of West Virginia in any area in which highway construction is being pursued.

This relocation of displacees is pursuant to the provisions of federal statutes administered by federal agencies. State Respondents, in order to obtain reimbursement for the expense of relocation assistance to displacees, supplemental rental allowances, etc., from the federal government must and have complied with all provisions, regulations, requirements and directives of the federal agencies in regard to relocation of displacees. Morover, pursuant to the applicable federal statutes, and the rules, regulations and directives promulgated thereunder[2], the State Respondents must, and have complied[3] with all relocation procedures and requirements affecting displacees in order to qualify for federal aid for other phases of the highway construction program.

To the Federal Respondents is delegated the responsibility of initially construing the requirements of the statutes, promulgating rules and regulations to carry the provisions of the statute into effect, and imposing sanctions in the event of non-compliance there-

[2] See Pet. Br. p. 3 for the statutes, regulations and policy directives involved; also Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, January 2, 1971, 84 Stat. 1894.

[3] Compliance, at least, to the satisfaction of the federal agencies administering the relocation provisions of the various statutes and regulations.

with by the State agency. The State Respondents have and will continue to comply with each and every statute, regulation, directive and procedure affecting relocation and displacement of persons or businesses as required by applicable federal statutes, responsible federal agencies or this Court.

However, State Respondents believe that the construction placed upon the Federal Aid Highway Act of 1968, 23 U.S.C. §501., *et seq.* in regard to displacement and relocation and the memorandums and directives issued pursuant thereto and in furtherance thereof by the Federal Respondents, as carried out by the State Respondents (and which construction and performance was affirmed by the District Court and the Fourth Circuit Court of Appeals), is a proper, valid, legal and logical construction and application thereof in regard to the two federally-aided highway projects with which we are here concerned and the individuals, families, businesses and organizations affected thereby.

QUESTIONS PRESENTED

State Respondents are in accord with Petitioners' general categorization of the questions presented for consideration herein, but take issue with some of the alleged factual statements inserted therein under the guise of "Questions Presented," as follows:

1. All of the Petitioners in subject litigation have not and will not be displaced by the interstate highway in question.

2. Also considered clearly erroneous by State Respondents are the numerous allegedly factual state-

ments (without reference to the authority or basis for such) that the housing market in the City of Charleston is racially discriminatory and that the persons displaced in the Triangle area are thereby excluded from obtaining replacement housing.

3. State Respondents further take serious issue with Petitioners' assertions that State Respondents refused to provide assurances of relocation housing prior to displacement of any person by highway construction.

STATEMENT OF THE CASE

Although cognizant of the provisions of Rule 40(3) Supreme Court Rules that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, it is considered more expedient to include a narrative statement of the case rather than to detail the inaccuracies and omissions contended by State Respondents to exist in Petitioners' statement.

After public hearings held in Charleston, West Virginia, on March 29, 1960, and June 10, 1964, pursuant to the applicable provisions of the Federal-Aid Highway Act, 23 U.S.C. § 128, the Bureau of Public Roads on August 31, 1964, approved the routing of combined Interstate 64 and Interstate 77 through the City of Charleston, West Virginia, which approved routing bisected the area of Charleston commonly referred to as the "Triangle".

According to the complaint filed in this proceeding by Triangle Improvement Council, the Triangle is bounded generally as follows: On the north by

Dryden Street, on the east by Capitol Street, on the south by Washington Street and on the west by Elk River (A. 10a). Interstate 64 (hereinafter referred to as I-64) is a generally east/west highway and Interstate 77 (hereinafter referred to as I-77) is a generally north/south highway. These two highways, together with Interstate 79, also a north/south highway, converge on the westerly side of Elk River opposite the Triangle area and I-64 and I-77 jointly cross the Elk River in a generally easterly direction into the Triangle area and continue eastwardly through the same (Pl. Ex. 1; A. 137a). Two separate projects affect the Triangle and have been designated Project A and Project B (A. 142a). Project A is approximately 2.9 miles long and begins at the interchange where I-77 and I-79 connect, proceeds down Elk River in a southerly direction to connect with I-64 at Glenn Street, then crossing Elk River through the Triangle to Young Street. Project B begins at Young Street in the Triangle and proceeds in a generally easterly direction to Jefferson Street, approximately 1.9 miles[4] (Volpe's Ex. 4; A. 208a and 275a).

The Bureau of Public Roads first authorized the State Road Commission to acquire right of way on Project A on April 19, 1966, and on Project B on November 30, 1966 (A. 192a). On Project A, there were approximately 1,293 persons to be relocated and on Project B there were approximately 897, or a total of 2,190. By February 28, 1969, approximately 913 of these persons had been relocated on Project A, and approximately 401 on Project B, or a total of

[4] The breaking point between the two projects will probably be Court Street which is one block east of Young Street (A. 209a).

1,314 persons. There remained to be relocated on Project A, approximately 380 persons and on Project B, approximately 496 persons, or a total of 876 (A. 213a and 214a). In the Triangle area there remained to be relocated as of February 28, 1969, approximately 116 individuals and 55 families of two or more persons. The total number of persons to be relocated was 284 (A. 148a and 149a) (A. 193a, 194a and 195a).

During the interim period from April 19, 1966, when right of way acquisition was first authorized by the Bureau of Public Roads until April 1, 1969, the day before hearings were begun in the District Court on the subject case, numerous parcels of real estate were acquired by the State Road Commission (Pl. Ex. 4; A. 147a; Ritchie Ex. 5 and 6; A. 383a).

Prior to August 23, 1968, the effective date of the 1968 relocation amendments to the Federal-Aid Highway Act, 23 U.S.C. §501, *et seq.*, the State Road Commission of West Virginia was far exceeding the requirements in regard to relocation assistance provided by the 1962 relocation assistance amendment to the Federal-Aid Highway Act of 1956, 23 U.S.C. §133, which became effective October 23, 1962.[5]

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[5] Paraphrasing the testimony of Gerald B. Saunders, Division Right of Way Officer, Bureau of Public Roads, Department of Transportation (A. 178a-182a, 209a-211a), 512 relocations on about 50 projects had been reviewed. Approximately 125 of these reviews were within the projects concerned herein and were under the requirements of the 1962 relocation advisory assistance amendments to the Federal-Aid Highway Act of 1956 (23 U.S.C. §133). Saunders was satisfied that the State Road Commission was providing all the relocation assistance required and *probably then some* if compared nationwide. (Emphasis Supplied)

For detailed narrative of the activity by the State Road Commission in relocation assistance, see A. 370a, 372a.

Upon passage of the 1968 relocation amendments to the Federal-Aid Highway Act of 1956, 23 U.S.C. §501, *et seq.*, the Bureau of Public Roads, Federal Highway Administration, U. S. Department of Transportation issued a series of Instructional Memorandums, Policy and Procedure Memorandums, and Circular Memorandums to cover the administration of the Highway Relocation Assistance Program created by the 1968 amendment, 23 U.S.C. §501, *et seq.* (Pl. Ex. 2 and 3; A. 139a).

Based upon the language of the statute, the various memorandums interpreting and supplementing the same, the officials of the Bureau of Public Roads concluded that, with the exception of relocation payments, the provisions of the Highway Relocation Assistance Program were not applicable to the two projects which affected the Triangle area.

Therefore, no assurances as mentioned in the statute (23 U.S.C. §502) and in the I.M. (I.M. 80-1-68, Section 5) were required by the Bureau of Public Roads on the projects affecting the Triangle (A. 175a and 176a), and no Relocation Program Plan was required for the two projects pursuant to said I.M. 80-1-68, Section 7.

However, with the exception of the Relocation Program Plan set forth in Section 7 of I.M. 80-1-68, the State submitted all other assurances required by the statute (23 U.S.C. §502) and the I.M. and its amendments on a state-wide basis and such assurances were approved by the Bureau of Public Roads (A. 150a-155a, 161a-165a). (Pl. Ex. 5, 6, 7, 8A, B, C; A. 154a, 155a, 163a and 164a).

Although no Relocation Program Plan under the provisions of Section 7 of I.M. 80-1-68 was supplied by the State, as such, in regard to the projects affecting the Triangle, the State Road Commission of West Virginia has been providing the relocation assistance and service to the displaced persons in the Triangle area (A. 370a-372a) and to the satisfaction of the officials of the Bureau of Public Roads (A. 175a-179a).

Irrespective of the lack of a formal, written relocation plan, the displacement and relocation activities of the State Road Commission of West Virginia in the Triangle area, both before and after August 23, 1968, must have also been to the apparent satisfaction of persons being displaced as there was no evidence of any sort introduced during the course of the hearing that any displaced person had not been properly relocated. One occupant of the Triangle, Mrs. Gladys Burton, although replacement housing was obtained, refused to move on advice of agents of the plaintiff herein (A. 373a-377a). One other person, Mrs. Geraldine Jordan, who rented a room, testified that she was requested to move by April 7, 1969, and that the State offered her no assistance (A. 344a-346a). It, however, developed on cross-examination that Mrs. Jordan had been advised of and was familiar with the location of the Relocation Office in the Triangle area and that no one had given her written notice to vacate or had threatened to evict her from the premises. She had occupied the premises about 4 or 5 months and had moved into the route of the interstate from the City of Institute. It further developed that the owner of the house, Mrs. Violett Nichols, had obtained replacement housing and there

were accommodations for her tenants also, but because of some personality conflict between Mrs. Jordan and a daughter of the landlady over room locations, she declined to move to the new location (A. 347a-350a).

The only other evidence of lack of relocation housing, other than studies, surveys and projections by various agencies, was the evidence of Robert Bayes, one of the plaintiffs herein, and an owner of real estate within the interstate route, who testified that he was approached by the State Road Commission two years ago, but had not been contacted since, nor had any action been taken to displace him. He has attempted to find housing (apparently to purchase) and the prices are tremendous (A. 429a-431a).

Moreover, since the hearings in the District Court, petitions have been filed requesting stays and injunctions in both the Circuit Court of Appeals and this Court, none of which have contained valid allegations of improper displacement of people or improper relocation thereof by State Respondents.

ARGUMENT

For sake of clarity the argument of State Respondents will be sub-divided into the same categories as Petitioners' argument and shall contain the same headings.

I.

THE DISPLACEMENT OF THE BLACK PETITIONERS INTO A RACIALLY DISCRIMINATORY HOUSING MARKET WITHOUT ADEQUATE GOVERNMENTAL MEASURES TO ASSURE NON-DISCRIMINATORY RELOCATION HOUSING DEPRIVES THEM OF THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioners' entire constitutional question is based upon the erroneous premise that the displacees are subject to private housing discrimination. State Respondents are not so vain or naive as to allege that no racial bias or prejudice exists in the City of Charleston, or to deny that racial bias or prejudice may well have been the predominant factor in the original creation of the "black ghetto of Charleston, West Virginia" (as Petitioners refer to the Triangle area), but said State Respondents do allege that any such racial discrimination as does exist does not and will not preclude the relocation of all persons involved herein on an open racial basis to adequate, safe, sanitary and decent housing.

The City of Charleston, in November, 1967, adopted an ordinance known as the Charleston Human Rights Act which, among other things, precludes all discrimination in the sale and/or rental of housing with the exception of facilities which will be partly occupied by the owner. Even this exception is limited to housing facilities of four units or under[6]. Therefore, with

[6] The entire Ordinance appears as an appendix to this brief.

the exception of housing facilities which are partially occupied by the owners, there is no racial discrimination in the housing market which would preclude the displaced persons in question from being provided relocation housing. The sole basis for such allegations of racial discrimination is contained in the testmony of one Carolyn Tillman and her supportive affidavit (Pl. Ex. 25; A. 333a-334a) to the effect that of the list of fifty dwelling units supplied to her by the State Relocation Office, only eight were below the $60.00 per month rental ceiling which she concluded was the maximum rental payable by the average income family of Triangle residents, and of these eight dwelling units, two were considered unavailable for rental by blacks. Unless these were within the exception to the Human Rights Ordinance, these two would have been available under the provisions of that Ordinance. Furthermore, in the survey of Mrs. Tillman (A. 344a) she did not consider public housing, "because people are not desirous of public housing."

There is no concrete evidence before this Court that any person has been denied replacement housing, either public or private, because of race, color, creed, national origin or otherwise.

It is submitted that proof of the existence of a racially discriminatory housing market might well make out a case of violation of the equal protection clause of the Constitution. However, mere assumptions and assertions that such discrimination exists, without proof thereof, is not sufficient to invoke the denial of equal protection safeguards of the Fourteenth Amendment.

II.

THE 1968 RELOCATION AMENDMENTS TO THE FEDERAL-AID HIGHWAY ACT AND REGULATIONS THEREUNDER GRANT RELOCATION BENEFITS TO THE TRIANGLE RESIDENTS WHICH HAVE NOT BEEN ADMINISTRATIVELY OR JUDICIALLY ACCORDED THEM.

A. The 1968 Relocation Amendments Assure Persons Not Yet Displaced As of the Date of Enactment the Right to Adequate Replacement Housing, and Pursuant Thereto Mandate Detailed Relocation Plans.

State Respondents agree that the 1968 Relocation Amendments assure persons not yet displaced as of the date of the enactment thereof the right to adequate replacement housing. This position has always been maintained by the State Respondents and has been consistently followed. Relocation assistance, service and allowances to persons displaced as required by the 1968 Relocation Amendments and the I.M.'s thereunder have been supplied by State Respondents to all persons who have been displaced by action of State Respondents. However, State Respondents do not agree that the 1968 Relocation Amendments require a detailed relocation plan for projects long since authorized and from the area of which a major portion of the persons had been removed.

As the learned District Judge said in his opinion (A. 54a):

> ". . . I am further convinced, after analyzing the statutory provisions, their legislative history, and the instructional memoranda issued pursuant thereto, that Congress could not have intended that projects authorized and approved several years prior to the enactment of the 1968

> statute were to be subject to inflexible and strict compliance therewith. The administrative agency did not give it such an interpretation, and I am of the opinion that the agency's determination had a rational basis and should not be disturbed."

Nothing within the statute itself requires the formulation and preparation of a detailed relocation plan. The statute, as such, requires only that certain satisfactory assurances be made to the Secretary before approval of any project which will cause the displacement of any person (23 U.S.C. §502). These assurances were made by State Respondents and were satisfactory to the Secretary (acting, of course, by and through his agents) (A. 164a, 176a). Petitioners' inference that the requirement of satisfactory assurances necessitates the preparation of an actual, formal, written relocation plan and submission of the same to the federal agency for approval is devoid of merit.

It was obvious to the officials of the Bureau of Public Roads, from past experience and association with relocation activities of State Respondents under the provisions of the 1962 Act, that the assurances required by the 1968 Act could be met and the assurances as given by State Respondents were thus "satisfactory" within the meaning of the statute.

Time has proven these officials to be correct in their assessment of the capabilities of State Respondents in these relocation activities. As of March 1, 1971, 9 persons remain as residents of the Triangle area within the right of way boundaries to be relocated to safe, sanitary and decent housing.

Nor does the provisions of the Memorandum entitled I.M. 80-1-68 dated September 5, 1968, and its subsequent revision dictate the mandatory preparation and approval of a relocation plan.

By Section 510 of the 1968 Relocation Amendment, the Secretary was given authority to make rules and regulations to carry out the provisions contained in Chapter 5 of Title 23, U.S.C. In compliance therewith, I.M. 80-1-68 was issued dated September 5, 1968. It is obvious to State Respondents from the cover letter attached thereto (Pet. Br. A. 17) that the same was an interim operating procedure and that after a period of operation thereunder they would be incorporated into a Policy and Procedure Memorandum.

It is further obvious to State Respondents that the assurances required by Section 5 of I.M. 80-1-68 were not required for the two projects here in question by reason of the language of Section 5(b)[7] thereof which is not subject to any other construction in that it is uncontroverted that authority to acquire right of way had been granted long before the effective date of the 1968 Relocation Amendment.

It is equally as obvious that the provisions of Section 7 of I.M. 80-1-68 (Development of Relocation Program Plan) does not apply to the two projects in question.

If great deference is given by the Courts to the interpretation given to statutes by the officers or agen-

[7] The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The state will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum. I.M. 80-1-68, Section 5(b).

cy charged with its administration as this Court has held in the case of *Udall* v. *Tallman*, 380 U.S. 1 (1965), how much greater deference should be given to the interpretation of rules and regulations promulgated by the officers to carry into effect the provisions of a statute.

The fact that no relocation plan was required upon projects which were underway at the time of the effective date of the 1968 Relocation Amendments was not solely the interpretation of the Division Right of Way Officer or the Division Engineer of the West Virginia Division of the Bureau of Public Roads and it was not limited to the two projects here in question. According to the testimony of P. E. Carpenter, the Division Engineer of the Bureau of Public Roads (A. 415a-417a), preparation of the I.M. in question was begun in June, 1968, when the possibilities appeared good that the Relocation Amendment would pass the Congress. Mr. Carpenter, then Chief of Appraisal and Acquisition, Office of Right of Way and Location, assisted in preparing the basic policy, and the subject of relocation plans for going projects was discussed at meetings of the Federal Highway Administration in Washington, D. C., prior to the enactment of the actual statute, and subsequently at meetings of all the top highway officials in the United States.

The interpretation throughout has been that no formal relocation plan was required on going projects by the provision of the statute (23 U.S.C. §501, *et seq.*) and I.M. 80-1-68.

Mr. Carpenter's testimony and the above conclusion are given weight and credence by the language

of additional memorandums (Pet. Br. A. 37, 39) dated December 26, 1968, and February 12, 1969, respectively.

Petitioners, in their brief, at page 34, N. 79, quote portions of these two memorandums as support for their position that relocation plans were required. The portions quoted, read separate and apart from the remainder of the memorandum, might well be construed as supportive of Petitioners' claim. However, close study of these subsequent memorandums does not support that contention.

The first of these, dated December 26, 1968, obviously applies to projects on which authorizations to negotiate to acquire right of way and/or begin construction[8] has not yet been given and relocation plans are clearly required under I.M. 80-1-68. However, under circumstances in which the State, under its present law, could not comply with the relocation requirements, the requirements of a relocation plan were partially rescinded and only sufficient data was required for the Division Engineer to determine the advisability of proceeding with the project.

Rather than strengthening Petitioners' position that relocation plans were considered mandatory on the subject projects by the Department of Transportation, this memorandum greatly weakens the same and shows

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[8] Counsel for Petitoners appear to have difficulty with the rather frequent use of the terminology "authorize to acquire right of way or commence construction" found in the various memorandums. There are circumstances under which federally-aided projects are constructed on right of way acquired without federal aid or owned by the State and, therefore, the first federal authorization may well be in relation to the construction aspect of the project.

that such relocation plans as prescribed by I.M. 80-1-68 were not absolutely essential to the authorization for beginning projects. Furthermore, as the State of West Virginia was able, under its laws, to comply with all requirements of the Relocation Amendments, and the two projects here in question were "going projects", this memorandum had no applicability to the subject case.

The other memorandum dated February 12, 1969, is concerned with Relocation Procedures—Going Projects. This Circular Memorandum indicates that States should undertake planning on all active projects to the extent that it is *reasonable and proper* (Emphasis Added). The memorandum recognizes that each such project involves a different set of circumstances and conditions and necessarily left additional authorizations to acquire right of way or authorize construction to the discretion of the Division Engineer based upon the information made available to him by the State.

It logically follows that if the statute and/or the I.M. 80-1-68 required a relocation plan as contended by the Petitioners herein, on the two projects in question, there was no need for the additional memorandum instructing the States to undertake such planning where reasonable and proper and leaving the extent thereof to the discretion of the Division Engineer.

With all due deference to the dissenting opinion of Judge Sobeloff (A. 72a-78a; 429 F. 2d 423) and the opinion of the panel of judges of the Fourth Circuit Court of Appeals that considered Petitioners' petition

for rehearing as Judge Sobeloff inferred it to be (A. 77a; 429 F. 2d 423, 426), State Respondents do not subscribe to the proposition that as the result of a policy directive of the Secretary of Transportation dated January 15, 1970 (Pet. Br. A. 41), and an implementing memorandum of the Federal Highway Administration dated March 27, 1970 (Amended April 10, 1970, Pet. Br. A. 43), the position of the Petitioners herein has now become the law.

The State Respondents have never contended and do not now contend that the 1968 Relocation Amendments do not apply to the projects in question. However, we do contend that by virtue of the provisions of I.M. 80-1-68(5) (b), the formal Relocation Plan required by I.M. 80-1-68(7) as a part of the "satisfactory assurances" are not required. The sole obligation of State Respondents on the two projects in question was to begin the actual physical activity of assisting persons to be displaced to be relocated into safe, sanitary and decent housing and to provide for them the various relocation allowances and payments as required by the statute and regulations. This has been done.

The memorandums of January 15, 1970, and April 10, 1970, in no way changed this procedure on the two projects in question. In fact, State Respondents are of the opinion that these memorandums, in effect, adopted the philosophy and theory of State Respondents to meet the relocation problem.

The District Court was assured that displacement would be conducted at a slow pace in order that adequate replacement housing could be found. This was done. At the time of the trial of this matter, no

authorizations for construction had been given and yet today no authorizations for construction have been given in any area in the Triangle still occupied by persons. The sole authorization for construction in the Triangle area is for piers for the bridge across Elk River and the construction touches no occupied areas of land.

Relocations are continuing under the constant scrutiny of Federal Highway Administration personnel, and when all of the residents have been adequately relocated to safe, sanitary and decent housing, then authorization for construction will be requested.

This is the identical procedure as contemplated by the memorandum of Secretary Volpe dated January 15, 1970. It provides, in part:

> "2. Construction will be authorized only upon verification that replacement housing is in place and has been made available to all affected persons."

How could such *verification* be made until actual relocation had taken place? Furthermore, if relocation has been made, the question of whether or not the replacement housing is fair housing—open to all persons, regardless of race, color, religion, sex or national origin is moot.

The implementing memorandum dated April 10, 1970 likewise precludes authorization for construction "until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy".

This is exactly what State Respondents have been doing since late 1968.

What advantage or benefit could or would have been afforded the persons to be displaced by the preparation of a formal relocation plan by State Respondents? A major portion of the people to be relocated on the two projects had been moved prior to the effective date of the 1968 Relocation Amendment. The remaining ones could not be prejudiced or injured by the State's program of delaying construction until relocation had been completed.

Rather than the Petitioners' position in this case becoming the law, it appears obvious that the policy of State Respondents has now become the law through the force and effect of Federal Regulations, by virtue of the above discussed memorandums.

B. IN THE ABSENCE OF COMPLIANCE WITH THE REQUIREMENTS OF THE 1968 RELOCATION AMENDMENTS, ADMINISTRATIVE ACTION BY STATE AND FEDERAL OFFICIALS CANNOT BE UPHELD ON THE BASIS OF GENERAL ASSURANCES THAT EFFORTS ARE BEING AND WILL BE MADE TO RELOCATE PERSONS DISPLACED, AND THAT ADEQUATE RELOCATION HOUSING EXISTS.

Responding to Petitioners' assertions under the above heading, State Respondents agree that if the statute and the I.M. required a comprehensive relocation plan on the two projects in question, then the assurances, as made to the Court during the trial, would not be an adequate substitute therefor. How-

ever, it is our contention, as above set forth, that the comprehensive relocation plan was not required.

1. *Reversal Is Required Because the Procedures Mandated by Law with Respect to the Submission for Review and Approval of a Comprehensive Relocation Plan Were Not Followed.*

State Respondents do not understand the opinion of the District Court to hold that the assurances made by State Respondents and relied upon by the Federal Respondents would "substantially comply" with the requirements for a comprehensive relocation plan. The District Court said that no such plan was required on the two projects in question by virtue of the statute and the regulations. The Court further held that from the evidence adduced in the trial, the State Respondents could comply with the provisions of the 1968 Relocation Amendment and the regulations relating thereto which were applicable to the two projects in question.

2. *The District Court's Purported Finding That Relocation Housing Was Adequate Was Clearly Erroneous.*

There is nothing to substantiate Petitioners' assertion that the District Court's determination of adequate relocation housing was made without reference to standards set forth in the statute and the regulations. The standards [I.M. 80-1-68(13)] were before the Court as a part of the Instructional Memorandum and even a cursory glance at the record will reveal that the testimony was crammed with the standard of "safe, sanitary and decent". The Court's opinion (A. 55a) likewise used the terminology.

The most logical answer as to whether or not the District Court's finding as to adequate relocation housing was erroneous is the fact that relocation has, for all practical purposes, been completed.

III.

THE QUESTIONS OF RETROACTIVE APPLICATION AND APPROPRIATE REMEDY.

State Respondents are in accord with Petitioners' suggestion as to retroactive application of this Court's ruling in the event of a ruling adverse to the position of State Respondents. However, again, little constructive benefit would be obtained by the formulation of a comprehensive relocation plan for the 9 people remaining in the Triangle area. They should simply be relocated in adequate, safe, sanitary and decent housing and in all probability will have been so relocated by the time decision is rendered herein.

State Respondents are aware that there are persons who have relocated from rights of way in the State of West Virginia (including the Triangle area) without knowledge of the State Respondents and have not received moving allowances and relocation benefits to which they may be entitled. A program is presently underway to locate these persons and see that they receive all benefits due them. This program is applicable throughout the State and not just in the Triangle area.

State Respondents feel Petitioners' suggestion on locating all persons displaced from the Triangle and report their present housing condition to the Court

is too broad a requirement to comply with the provisions of the 1968 Act. Over two and one-half years have elapsed since the effective date of the 1968 Act, and the present housing condition of some of these people would not be pertinent or germane to the issue. However, it would appear, if the Court deems it necessary, that it would not be unreasonable to require State Respondents to use diligent efforts to ascertain the housing conditions to which the individual moved immediately upon displacement and act accordingly pursuant to the Court's mandate.

CONCLUSION

State Respondents are cognizant that problems exist throughout the country in regard to displacement of individuals, families, and businesses as the result of the Federal and Federally-Aided Highway Programs. They are likewise apprised of the many studies, investigations and reports in regard to the same prepared by Congressional Committees, Public and Private Agencies, and have supplied data and information for use in such reports in an endeavor to assist in arriving at equitable and just solutions to the relocation problems. State Respondents are committed to the proposition, "that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole", and has conducted its displacement and relocation activities accordingly.

State Respondents, by their counsel, have also taken cognizance of the numerous citations of court decisions in support of the various propositions proffered by

Petitioners in regard to racial discrimination; Constitutional questions, administrative procedure and judicial review thereof; and concede that the court decisions, as cited, properly state the law. However, the facts of the case at bar do not lend themselves to application of the theories of law advanced by Petitioners. Therefore, State Respondents have approached this matter from a purely factual basis, and refrained from a discussion of the law.

The sole issue in this case is whether or not the 1968 Relocation Amendments to the Federal-Aid Highway Act and the regulations promulgated by Secretary pursuant thereto require State Respondents to make certain assurances, a part of which assurances involves the preparation of a comprehensive relocation plan, for projects authorized prior to the effective date of the statute. There is no question as to the proper construction of the language in question [I.M. 80-1-68(5) (b)] and assurances are not required.

The evidence clearly shows that State Respondents could fully comply with the remaining applicable provisions of the statute, the (I.M. 80-1-68), and the supplemental memorandums in its relocation program. The passage of time has shown conclusively that it did.

There may be relocation problems within the Federal Highway Program that cry out for relief and there may be instances in which, "the Department of Transportation has shown little regard for its own policy statements as limits upon or guides to its actions" (Pet. Br. 37), but the Triangle area of the City of Charleston is not such an instance.

The relief prayed for by Petitioners should be denied.

Respectfully submitted,

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AN ORDINANCE repealing Article 75, Part 9, Streets and Public Services Law, Code of the City of Charleston, 1957, known as Ordinance 919—Amended, and enacting Ordinance Article 75, Part 9, Streets and Public Services Law, Code of the City of Charleston, 1957, relating to establishment of the Charleston Human Rights Commission, prohibiting discrimination in employment, housing and public accommodations and providing penalties for violations:

Be it ordained by the Council of the City of Charleston;

That Article 75, Part 9, Streets and Public Services Law, Code of the City of Charleston, 1957, known as Ordinance 919—Amended, adopted by Council on October 2, 1967, be repealed and that Article 75, Part 9, Streets and Public Services Law, Code of the City of Charleston, 1957, as hereinafter provided is hereby enacted to read as follows:

Section 1. *This ordinance shall be known and may be cited and referred to as The Charleston Human Rights Act.*

Section 2. *Policy Declared.*—It is the public policy of the City of Charleston to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment, public accommodations, housing and real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin or ancestry.

The denial of these rights to properly qualified persons by reason of the race, religion, color, national origin or ancestry is contrary to the principles of freedom and equal opportunity and is destructive to a free and democratic society.

Section 3. *Definitions.*—When used in this ordinance:

(a) The term "person" means one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees,

trustees in bankruptcy, receivers, and other organized groups of persons.

(b) The term "commission" means the Charleston Human Rights Commission.

(c) The term "director" means the executive director of the Charleston Human Rights Commission.

(d) The term "employer" includes the city, or any political or civil subdivision thereof, and any person employing five (5) or more persons within the City, provided that such term shall not be taken, understood or construed to include a private club.

(e) The term "employee" shall not include any individual employed by his parents, spouse, or child, or in the domestic service of any person.

(f) The term "labor organization" includes any organization which exists for the purpose, in whole or in part, for collective bargaining or for dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to employment.

(g) The term "employment agency" includes any person undertaking with or without compensation to procure, recruit, refer or place employees.

(h) The term "discriminate" or "discrimination" means to exclude from or fail or refuse to extend to a person equal opportunities because of race, religion, color, national origin or ancestry, and includes to separate or segregate.

(i) The term "unlawful discriminatory practices" includes only those practices specified in Section 9 of this ordinance.

(j) The term "place of public accommodations" means any establishment or person, as defined herein, including the City, or any political or civil subdivision thereof, which offers its services, goods, facilities, or accommodations to the general public, but shall not include any accommodations which are in their nature distinctly private.

(k) The term "housing accommodations" means any building or portion thereof, which is used or intended for use as the residence or sleeping place of one or more persons, but does not include (A) the rental of a dwelling, or a portion thereof, containing accommodations for two, three or four families, one of which accommodations is maintained by the owner at the time of rental as the household of his family or (B) the rental of a room or rooms in a single family private dwelling or room in any apartment sublet by the owner or tenant of said apartment to another person or persons by the owner or occupant of such accommodation in which he or members of his family reside.

(l) The term "real property" includes real estate, lands, leaseholds, commercial or industrial buildings, and any vacant land offered for sale or rent on which the construction of a housing accommodation, commercial or industrial building is intended.

(m) The term "real estate broker" includes a person, firm, or corporation who, for a fee, commission, or other valuable consideration, or by reason of a promise or reasonable expectation thereof, lists for sale, sells, exchanges, buys, or rents, or offers or attempts to negotiate a sale, exchange, purchase, or rental of real estate or an interest therein, or collects or offers or attempts to collect rent for the use of real estate or solicits for prospective purchaser or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting, or auctioning of any real estate or negotiates, offers, or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others, or any person who, for pecuniary gain or expectation of pecuniary gain, conducts a private or public competitive sale of lands or any interest in lands. In the sale of lots, the term "real estate broker" shall also include any person, partnership, association, or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts

thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

(n) The term "real estate salesman" includes any person who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed by and operates under the supervision of a real estate broker to sell or offer to sell, buy or offer to buy or negotiate the purchase, sale or exchange of real estate, offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrances upon or transfer of real estate, to lease or rent, or offer to lease or rent any real estate for others, or to collect rents for the use of real estate, or to solicit for prospective purchasers or lessees of real estate, or who is employed by a licensed real estate broker to sell or offer to sell lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise to sell real estate, or any parts thereof, in lots or other parcels.

(o) The term "purchaser" includes any occupant, prospective occupant, lessee, prospective lessee, buyer or prospective buyer.

(p) The term "owner" shall include the owner, lessee, sublessee, assignee, manager, agent, or other person, firm or corporation having the right to sell, rent or lease any housing accommodation or real property within the City of Charleston or any agent of any of these.

(q) The term "complainant" means any individual charging on his own behalf of have been personally aggrieved by discriminatory practices.

Section 4. *Human Rights Commission Created; Status, Powers and Objects.*—A Charleston human rights commission is hereby created and established in the city government. The commission shall have the powers and authority and shall perform the functions and services as in this ordinance prescribed and as otherwise provided by law. The commission shall encourage and endeavor to bring about mutual under-

standing and respect among all racial, religious and ethnic groups within the city and shall strive to eliminate all discrimination in employment, places of public accommodations and in the sale, purchase, lease, rental or financing of housing and other real property by virtue of race, religion, color, national origin or ancestry.

Unless the context clearly requires another meaning or reference, the word "commission" as used in this ordinance shall be construed to mean and to refer to the Charleston human rights commission.

Section 5. *Commission Composition; Terms; Oath of Office; Expenses.*—The commission shall be composed of nine members, all residents and citizens of the City of Charleston, and broadly representative of the several racial, religious and ethnic groups residing within the City, to be appointed by the Mayor by and with the advice and consent of the City Council.

Not more than five members of the commission shall be members of the same political party.

Upon passage of this ordinance, members of the commission shall be appointed to terms of three years commencing on the first day of July of the year of their appointments, except that the nine members first appointed hereunder shall be appointed for terms of from one to three years, respectively, retroactively to the proceeding July 1st so that the terms of three members of the commission will expire on the thirtieth day of June of each succeeding year thereafter. Upon the expiration of the initial terms, all subsequent appointments shall be for terms of three years each, except that appointments to fill vacancies shall be for the unexpired term thereof. Members shall be eligible for reappointment.

No member of the commission shall receive any salary or compensation for his services as such, but each member shall be reimbursed for any reasonable and necessary travel expenses incurred in performance of commission services.

Section 6. *Commission Organization and Personnel.*—As soon as practical after the creation of the commission, the Mayor

shall call a meeting thereof to be convened at the City Building. The commission shall at the meeting organize by electing one of its members as chairman of the commission and one as vice-chairman thereof for a term of one year or until their successors are elected and qualified. At such meeting the commission shall also elect from its membership such other officers as may be found necessary and proper for its effective organization. Annually thereafter, as soon as practical after the first day of July, the commission shall elect a chairman and vice-chairman from its membership and such other officers as may be found necessary and proper for its effective organization.

The commission shall, subject to the approval of the Mayor, select an executive director, by and with the advice and consent of the City Council, who shall serve at the will and pleasure of the commission and the Mayor. The executive director shall serve as secretary of the commission. The executive director shall have a college degree. He shall be selected with particular reference to his training, experience and qualifications for the position and shall be paid an annual salary, payable in monthly installments, from any appropriations made therefor. The commission, upon recommendation of the executive director, may employ such personnel as may be necessary for the effective and orderly performance of the functions and services of the commission.

The commission shall equip and maintain its offices at the City Building and shall hold its annual organizational meeting there. The commission may hold other meetings during the year at such times and places within the City as may be found necessary. Any five (5) members of the commission shall constitute a quorum for the transaction of business. Minutes of its meetings shall be kept by its secretary.

The executive director and other commission personnel shall be reimbursed for necessary and reasonable travel and subsistence expenses actually incurred in performance of commission services upon presentation of properly verified expense accounts as prescribed by law.

The commission shall prepare and submit an annual budget

to the City Council for approval. This budget, however, shall be predicated upon the appropriation annually made by the City Council for expenditure by the commission.

Section 7. *Assistance to Commission; Legal Services.*—The commission may call upon other officers, departments and agencies of the city government to assist in its hearings, programs and projects. The City Solicitor shall render legal services to the commission upon request made by the commission or by the chairman or the executive director thereof.

Section 8. *Commission Powers, Functions; Services.*—The commission is hereby authorized and empowered:

(a) To cooperate and work with federal, state and local government officers, units, activities and agencies in the promotion and attainment of more harmonious understanding and greater equality of rights between and among all racial, religious and ethnic groups in this City;

(b) To enlist the cooperation of racial, religious and ethnic units, community and civic organizations, industrial and labor organizations and other identifiable groups of the City in programs and campaigns devoted to the advancement of tolerance, understanding and the equal protection of the laws for all groups and peoples;

(c) To receive, investigate, and pass upon complaints alleging discrimination in employment, places of public accommodations or in the sale, purchase, lease, rental and financing of housing accommodations or real property because of race, religion, color, national origin or ancestry, and to initiate its own consideration of any situations, circumstances or problems, including therein any racial, religious or ethnic group tensions, prejudice, disorder or discrimination reported or existing within the City relating to employment, places of public accommodations, and housing and real property;

(d) To hold and conduct public and private hearings on complaints, matters and questions before the commission and, in connection therewith, relating to discrimination in employment, places of public accommodations or in the sale, purchase, lease, rental and financing of housing accommodations

or real property, and during the investigation of any formal complaint before the commission relating thereto, to:

(1) *Issue subpoenas and subpoenas duces tecum* upon the concurrence of at least five (5) members of the commission, adminster oaths, take the testimony of any person under oath, and make reimbursement for travel and other reasonable and necessary expenses in connection with such attendance;

(2) Furnish copies of public hearing records to parties involved therein upon their payment of the reasonable costs thereof to the commission;

3. Delegate to a panel of three (3) commission members appointed by the chairman, the power and authority to hold and conduct the hearings, as herein provided, but all decisions and action growing out of or upon any such hearings shall be reserved for determination by the commission;

(4) To enter into conciliation agreements;

(5) To apply to the Circuit Court of Kanawha County for enforcement of any conciliation agreement by seeking specific performance of such agreement;

(6) To issue cease and desist orders against any person found after a public hearing to have violated the provisions of this ordinance, or the rules and regulations of the commission;

(7) To apply to the Circuit Court of Kanawha County for an order enforcing any lawful cease and desist order issued by the commission.

(e) To recommend to the Mayor and Council, policies, procedures, practices and legislation in matters and questions affecting human rights.

(f) To delegate to its executive director such powers, duties and functions as may be necessary and expedient in carrying out the objectives and purposes of this ordinance.

(g) To prepare a written report on its work, functions and services for each year ending on the thirtieth day of June and to deliver copies thereof to the Mayor on or before the first day of December next thereafter.

(h) To do all other acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by the provisions of this ordinance including the promulgation of rules and regulations implementing the powers and authority hereby vested in the commission.

(i) To create such advisory agencies and conciliation councils, within the City, as in its judgment will aid in effectuating the purposes of this ordinance, to study the problem of discrimination in all or specific fields or instances of discrimination because of race, religion, color, national origin or ancestry; to foster, through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the population of this City, and to make recommendations to the commission for the development of policies and procedures, and for programs of formal and informal education, which the commission may recommend to the appropriate City agency. Such advisory agencies and conciliation councils shall be composed of representative citizens serving without pay. The commission may itself make the studies and perform the acts authorized by this paragraph. It may, by voluntary conferences with parties in interest, endeavor by conciliation and persuasion to eliminate discrimination in all the stated fields and to foster good will and cooperation among all elements of the population of the City.

(j) To accept contributions from any person to assist in the effectuation of the purposes of this section, and to seek and enlist the cooperation of private, charitable, religious, labor, civic and benevolent organizations for the purposes of this section.

(k) To issue such publications and such results of investigation and research as in its judgment will tend to promote good will and minimize or eliminate discrimination provided that the identity of the parties shall not be disclosed.

Section 9. *Unlawful Discriminatory Practices.*—It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States

or the State of West Virginia or the City of Charleston or any agencies or political subdivisions of said United States, State of West Virginia, or City of Charleston;

(a) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is able and competent to perform the services required.

(b) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to (1) elicit any information or make or keep a record of or use any form of application or application blank containing questions or entries concerning the race, religion, color, national origin or ancestry of any applicant for employment or membership; (2) print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon race, religion, color, national origin or ancestry; (3) deny or limit, through a quota system, employment or membership because of race, religion, color, national origin or ancestry.

(c) For any labor organization because of the race, religion, color, national origin or ancestry of any individual to deny full and equal membership rights to any individual or otherwise to discriminate against such individuals with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly, related to employment.

(d) For an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs to:

(1) Select individuals for an apprentice training program registered with the City of Charleston on any basis other than their qualifications as determined by objective criteria which permit review;

(2) Discriminate against any individual with regard to his right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, or other occupational training or retraining program;

(3) Discriminate against any individual in his pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs;

(4) Print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, discrimination or any intent to discriminate unless based on a bona fide occupational qualification.

(e) For any employment agency to fail or refuse to classify properly, refer for employment or otherwise to discriminate against any individual because of his race, religion, color, national origin or ancestry.

(f) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to:

(1) Refuse, withhold from, or deny to any individual because of his race, religion, color, national origin or ancestry, either directly or indirectly, any of the accommodations, advantages, facilities, privileges, or services of such place of public accommodation;

(2) Publish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, privileges, or services of any such place shall be refused, withheld from or denied to any individual on account of race, religion, color, national origin or ancestry, or that the patronage or custom thereat of any individual, belonging to or purporting to be of any particular race, religion, color, national origin or ancestry is unwelcome, objectionable, not acceptable, undesired or not solicited;

(g) For the owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any housing accommodations or real property or part or portion thereof, or any agent or employee of any of them; or for any real estate broker, real estate salesman, or employee or agent thereof:

(1) To refuse to sell, rent, lease, assign or sublease or otherwise to deny to or withhold from any person or persons any housing accommodations or real property or part or portion thereof or represent that such housing accommodations are not available for inspection when in fact they are so available, provided, of course, that the request for inspection is made at a reasonable time, and that the inspection be made at a reasonable time, because of race, religion, color, national origin or ancestry of such person or persons. Nothing in this ordinance shall be deemed to permit any rentals or occupancy otherwise prohibited by law;

(2) To discriminate against any person or persons because of the race, religion, color, national origin or ancestry of such person or persons in the terms, conditions, or privileges of sale, rental or lease of any housing accommodations or real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication, or sign or to use any form of application for the purchase, rental, lease, assignment, or sublease of any housing accommodations or real property, or part or portion thereof, or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any housing accommodations or real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religion, color, national origin or ancestry, or any intent to make any such limitation, specification, or discrimination, and the production of any statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be prima facie evidence in any action that the same was authorized by such person.

(h) For any person or financial institution or lender to whom application is made for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodations or real property or part or portion thereof or any agent or employee thereof:

(1) To discriminate against any person or group of persons because of the race, religion, color, national origin or ancestry of such person or group of persons or of the prospective occupants or tenants of such housing accommodations or real property or part or portion thereof, in the granting, withholding, extending, modifying, or renewing, or in the fixing of the rates, terms, conditions, or provisions of any such financial assistance or in the extension of services in connection therewith; or

(2) To use any form of application for such financial assistance or to make any record or inquiry in connection with applications for such financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin or ancestry or any intent to make any such limitation, specification, or discrimination.

(i) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman, or financial institution to:

(1) Engage in any form of threats or reprisals, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass, or cause physical harm or economic loss or to aid, abet, incite, compel, or coerce any person to engage in any of the unlawful discriminatory practices defined in this ordinance;

(2) Wilfully obstruct or prevent any person from complying with the provisions of this ordinance, or to resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of duty under this ordinance;

(3) Engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this ordinance or because he has filed a complaint, testified, or assisted in any proceeding under this ordinance.

Section 10. *Procedures.*—Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice shall

make, sign, and file with the commission a verified complaint, which shall state the name and address of the person, employer, labor organization, owner or real estate broker or agency, financial institution or lender, or employment agency alleged to have committed the unlawful discriminatory practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the commission's rules and regulations. The commission upon its own initiative or the Mayor, or the City Solicitor may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of them, hinder or threaten to hinder compliance with the provisions of this ordinance shall file with the commission a verified complaint, asking for assistance by conciliation or other remedial action and, during such period of conciliation or other remedial action, no hearings, orders or other actions shall be taken, held, or made by the commission against such employer. Any complaint filed pursuant to this ordinance must be filed within sixty (60) days after the alleged act of discrimination.

After the filing of any complaint, or whenever there is reason to believe that an unlawful discriminatory practice has been committed the commission shall make a prompt investigation in connection therewith.

If it shall be determined after such investigation that no probable cause exists for substantiating the allegations of the complaint, the commission shall, within ten (10) days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten (10) days after such service, file with the commission a written request for a meeting with the commission to show probable cause for substantiating the allegations of the complaint. If it shall be determined after such investigation or meeting that probable cause exists for substantiating the allegations of the complaint, the commission shall immediately endeavor to eliminate the unlawful discriminatory practices complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors; Provided, that the commission may publish the facts in the case of any complaint which

has been dismissed, and the terms of the conciliation when the complaint has been adjusted, without disclosing the identity of the parties involved.

In case of failure so to eliminate such practice or in advance thereof, if in the judgment of the commission circumstances so warrant, the commission shall cause to be issued and served a written notice, together with a copy of such complaint as the same may have been amended, in the manner provided by law for the service of summons in civil actions, requiring the person, employer, labor organization, employment agency, owner, real estate broker or agency, financial institution or lender, named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission in Charleston at a time and place to be specified in such notice: Provided, however, that such written notice be served at least thirty (30) days prior to the time set for the hearing.

The case in support of the complaint shall be presented before the commission by one of its attorneys or agents. The respondent may file a written, verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony and evidence. Except as provided in the immediately preceding provision all of the pertinent provisions of Article 5, Chapter 29A of the Code of West Virginia shall apply to and govern the hearing and the administrative procedure in connection with and following such hearings with like effect as if the provisions of said Article 5, Chapter 29A were set forth in extenso in this section.

If, after such hearing and consideration of all of the testimony, evidence and record in the case, the commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this ordinance, the commission shall issue and cause to be served on such respondent an order to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organiza-

tion or the admission to full and equal enjoyment of the services, goods, facilities, or accommodations offered by any respondent place of public accommodation, and the sale, purchase, lease, rental, or financial assistance to any complainant otherwise qualified for the housing accommodation or real property, denied in violation of this ordinance, as in the judgment of the commission, will effectuate the purposes of this ordinance, and including a requirement for report of the manner of compliance. Such order shall be accompanied by findings of fact and conclusions of law as specified in Section 3, Article 5, Chapter 29A of the Code of West Virginia.

If, after such hearing and consideration of all of the testimony, evidence and record in the case, the commission shall find that a respondent has not engaged in such unlawful discriminatory practice, the commission shall state its findings of fact and conclusions of law as aforesaid and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent.

A copy of its order shall be delivered in all cases by the commission to the complainant, to the respondent, to the City Solicitor, and to such other public officers as the commission may deem proper. Any such order shall not be enforceable except as provided in Section 11 of this ordinance.

Any person against whom a cease and desist order has been served by the commission shall have a full appeal and complete right of review as a matter of right by the Circuit Court of Kanawha County, and from that Court to the Supreme Court of Appeals of West Virginia in accordance with the laws of the State of West Virginia, provided, however, that any provision of Chapter 29A supercede this provision in event of any conflict thereto.

Section 11. *Enforcement of Cease and Desist Order.*—In the event any person shall fail to obey a lawful cease and desist order of the commission, the commission may seek an order of the Circuit Court for its enforcement, in a proceeding as provided in this section. Such proceeding shall be brought in the Circuit Court of Kanawha County. Such proceedings shall be initiated by the filing of a petition in such Court, together with a written transcript of the entire record upon

the hearing before the commission. Notice of the filing of such petition, together with a copy thereof shall be served upon respondent in the manner provided by law for the service of summons in civil actions. No hearing shall be held upon such petition within twenty (20) days of the date of service thereof on the respondent.

The Court may grant such temporary relief or restraining order as it deems just and proper and shall make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the commission. All such proceedings shall be heard and determined by the Court. The jurisdiction of the Circuit Court shall be exclusive and its judgment and order shall be final subject to review by the Supreme Court of Appeals.

Section 12. *Exclusiveness of Remedy.*—The procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this ordinance, he may not subsequently resort to the procedure herein. In the event of a conflict between the interpretation of a provision of this ordinance and the interpretation of a similar provision contained in any state law, the interpretation of the provision of the state law shall apply to this municipal ordinance.

Section 13. *Penalty.*—Any person who shall wilfully resist, prevent, impede or interfere with the commission, its members, agents or agencies in the performance of duties pursuant to this ordinance, or shall wilfully violate a final order of the commission, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or by imprisonment not exceeding thirty (30) days, or by both such fine and imprisonment in the discretion of the court, but seeking judicial review of an order shall not be deemed to be such wilfull conduct.

Section 14. This ordinance shall in no way be construed to deny to any person his rights as they exist at common law or under the laws of the State of West Virginia, for redress or damages, in the event of wilfull and malicious wrongs or harassment committed upon him.

Section 15. *Construction; Severability.*—The provisions of this ordinance shall be liberally construed to accomplish its objectives and purposes. If any provision of this ordinance be held invalid or unconstitutional by any court of competent jurisdiction, such invalidity or unconstitutionality shall not affect or invalidate the other provisions hereof, all of which are declared and shall be construed to be separate and severable.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 712

TRIANGLE IMPROVEMENT COUNCIL, ET AL., PETITIONERS

v.

WILLIAM S. RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (App. 65a–66a), the order denying rehearing *en banc* (App. 71a) and the dissent from that order (App. 72a–78a) are reported at 429 F. 2d 423. The opinion of the district court (App. 35a–59a) is reported at 314 F. Supp. 20.

JURISDICTION

The judgment of the court of appeals (App. 67a) was entered on May 14, 1970, and a petition for rehearing was denied July 14, 1970. The petition for a writ of certiorari was filed on September 17, 1970; it was granted

on December 21, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the finding of the district court that "[t]he evidence indicates that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from an interstate highway corridor," is clearly erroneous.

2. Whether the Department of Transportation correctly construed the 1968 relocation amendments to the Federal-Aid Highway Act, and its own regulation promulgated thereunder, as not requiring that a formal relocation plan be submitted and approved for federally-aided highway projects on which rights-of-way had been acquired and persons displaced prior to the effective date of the 1968 amendments.

STATUTES AND REGULATIONS INVOLVED

Section 123 of Title 23, the Federal-Aid Highway Act of 1962 (23 U.S.C. 133), provided in pertinent part as follows:

> (a) As used in this section the term "eligible person" means any individual, family, business concern (including the operation of a farm) and nonprofit organization to be displaced by construction of a project.
>
> (b) The Secretary prior to his approval of any project under section 106 of this title for right-of-way acquisition or actual construction shall require the State highway department to give satisfactory assurance that relocation advisory

assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway.

(c) The Secretary shall approve, as part of the cost of construction of a project on any of the Federal-aid highway systems, such relocation payments as may be made by a State highway department, or a local public agency acting as an agent for the State highway department for this purpose, to eligible persons for their reasonable and necessary moving expenses caused by their displacement from real property acquired for such project. However, the Secretary shall not require a State to pay relocation payments where not authorized by State law.

(d) Payments under this section shall be subject to such rules and regulations as may be prescribed by the Secretary, and shall not exceed $200 in the case of an individual or family, or $3,000 in the case of a business concern (including the operation of a farm) or nonprofit organization. In the case of a business (including the operation of a farm) and in the case of a nonprofit organization, the allowable expenses for transportation under this subsection shall not exceed the cost of moving 50 miles from the point from which such business or organization is being displaced. Such rules and regulations may include provisions authorizing reimbursement for payments made to individuals and families of fixed amounts (not to exceed $200 in any case) in lieu of their respective reasonable and necessary moving expenses.

(e) This section shall apply only with respect to projects approved under section 106 of this title after the date of enactment of this section.

The Federal-Aid Highway Act of 1968 (23 U.S.C. (Supp. V) 501, *et seq.*, 82 Stat. 830), and the 1970 amendments thereto (Pub. L. 91–605, § 117), are set forth in Appendix A to this brief at pp. 53–64, *infra*.[1] Relevant portions of the Instructional Memorandum of September 5, 1968, and the various pertinent circular memoranda issued by the Department of Transportation under the 1968 Act, are set forth in Appendix B to this brief at pp. 65–89, *infra*.

STATEMENT

This suit was commenced as a class action on December 3, 1968, by the Triangle Improvement Council (an organization of residents in the so-called Triangle area of Charleston, West Virginia), and several of its members (App. 11a–13a). It sought injunctive and declaratory relief to prevent respondents[2] from proceeding with construction of a section of two federally-aided highways—Interstate Highways I–64 and I–77[3]—

[1] The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (hereafter referred to the "Uniform Relocation Assistance Act of 1970"), which was enacted on January 2, 1971, repealed Chapter 5 of Title 23 (Section 220(a)(10); Pet. Supp. Br. App. 10). However, Section 220(b) of Act provides: "Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Acts or portions thereof under subsection (a) of this section" (Pet. Supp. Br. App. 10).

[2] Respondents include the City of Charleston, West Virginia, officials of the State of West Virginia, the Secretary of Transportation and two subordinate officials of the Department of Transportation (App. 13a–14a).

[3] The two Interstate routes converge on the Charleston area, I–77 running north-south from Cleveland, Ohio, to the south-eastern United States, and I–64 running east-west from coast to coast (App. 42a). They intersect inside the city limits of Charleston.

through the Triangle, which is inhabited primarily by low-income Negroes. Among other things, petitioners charged that respondents had failed to comply with the 1968 statutory and regulatory requirements for relocation of residents to be displaced by the highway (App. 16a–17a).

Prior to trial, the district court ruled that insofar as the suit sought to attack the basic decision relating to the routing of the highway, made final in August 1964, it was barred by laches (App. 39a).[4] The issues were thus narrowed to whether the Constitution, statute, or pertinent regulations required that a formal relocation plan be submitted and approved as a condition to the approval of federal financial aid for this highway project.[5] After a full trial, the district court held, in a lengthy opinion (App. 35a–59a), that there was no such requirement. The court of appeals affirmed *per curiam* on the opinion of the district court (App. 65a–66a).

1. On August 20, 1964, the West Virginia State Road Commission, on the basis of extensive studies and two separate public hearings held in Charleston in March 1960 and June 1964,[6] requested federal approval for the

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Throughout this brief, both highways will hereafter be referred to as "I–77."

[4] The issue has since been abandoned by petitioners and is not now a question before this Court (Pet. Br. 17–18).

[5] The project in question is being built as a federal-state venture under the Federal-Aid Highway Act, 23 U.S.C. 101, *et seq.*, which authorized federal grants to the states of 90 percent of highway costs to facilitate "the prompt and early completion of the National System of Interstate and Defense Highways * * *." 23 U.S.C. 101(b), 120(c).

[6] Under the statute as it then provided, the states "to the greatest extent possible" select the different routes, subject to the ap-

present route of highway I–77 through the Charleston area (App. 41a). At that time certain state "assurances" relating to relocation assistance for those to be displaced by the proposed routing were submitted (App. 152a–155a), pursuant to 23 U.S.C. 133, and it is unquestioned that these complied fully with the then applicable statutory standard (App. 43a).[7] The Bureau of Public Roads gave approval on August 31, 1964 (App. 357a).[8] The route selected covers a distance of approximately 4.8 miles, and involves two separate Interstate projects of the State Road Commission (App. 132a), for convenience designated in these proceedings as "Project A" and "Project B." A portion of each of these projects lies outside the Triangle area, but both penetrate the

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proval of the Secretary of Transportation (23 U.S.C. 103(d)). The Act required that a state highway department submitting plans for a route "involving the bypassing of, or going through, any city, town or village * * * shall certify to the Secretary that it has had public hearings * * * and has considered the economic effects of such a location." 23 U.S.C. 128(a).

[7] Section 133 required that "the State highway department * * * give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway."

[8] The Bureau of Public Roads, which administers the Federal-aid Highway Program, was then a part of the Department of Commerce. The Secretary of Commerce had delegated his authority to perform most of the functions vested in him under the Act to the head of the Bureau, the Federal Highway Administrator. 25 Fed. Reg. 4162, 4166 (1960). Under the Department of Transportation Act of 1966 the Bureau of Public Roads was transferred to the new Department of Transportation (49 U.S.C. (Supp. V) 1655(a)(1)), and federal approvals of Interstate highway routing are now the responsibility of the Secretary of Transportation.

area at different locations and meet within the Triangle at Young Street (App. 208a–209a).[9]

Following federal approval of the route, state highway officials proceeded to complete the necessary steps under the regulations (*FHWA Policy and Procedure Memorandum* 21–5) to obtain authorization for right-of-way acquisitions on Projects A and B. It is undisputed that proper right-of-way surveys, plans, and specifications relating to each project were submitted to the Bureau of Public Roads by the State Highway Right of Way Division (App. 135a–136a). Between April 19, 1966, and May 23, 1967, the Bureau of Public Roads, pursuant to 23 U.S.C. 106, authorized four separate right-of-way acquisitions, together covering all parcels of land in Project A; a similar single authorization for Project B was given on November 30, 1966 (App. 199a, 229a–231a).

The exact number of properties acquired, optioned or condemned by the state prior to August 23, 1968, the date of enactment of the pertinent relocation amendments, or prior to September 5, 1968, the issuing date of the Department regulation relating to formal relocation planning, is unclear from this record (App. 143a–144a, 147a–148a). The record shows that several hundred properties—or approximately 60 percent of all the right-of-way—had been acquired over the 2-mile length of Project A as of the time of trial (App. 143a) and that

[9] Project A, identified as I–77–3(66)100 (App. 142a), ran from Newhouse Branch to Young Street (App. 208a), a distance of approximately 2 miles. Project B, identified as I–77–3(67)98 (App. 142a), ran from Jefferson Street to Young Street (App. 208a), a distance of some 2.8 miles. See Volpe's Ex. 4.

an estimated 200 properties—or approximately 60 percent of the right-of-way—had been acquired in Project B well before that date (App. 147a).[10]

2. The relocation amendments here in question were added to the Federal-Aid Highway Act on August 23, 1968. 23 U.S.C. (Supp. V) 501 *et seq.* Essentially, they provide that any person displaced by a federal-aid highway project after that date "may elect to receive actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property" (23 U.S.C. (Supp. V) 505). If a property owner, he is entitled to a payment from the state, in addition to the acquisition price of the property taken, of up to $5,000, representing the difference between the acquisition price and the cost of obtaining a comparable dwelling (23 U.S.C. (Supp. V) 506(a)). A tenant may receive a payment not to exceed $1,500, to enable him to rent for a period of two years, or make the down payment on the purchase of, "a decent, safe, and sanitary dwelling * * *" not less desirable than his existing one (23 U.S.C. (Supp. V) 506(b)). All such relocation payments by the states are to be reimbursed by the federal government as a part of the cost of construction of the highway (23 U.S.C. (Supp. V) 504).[11]

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[10] Throughout the trial, the term "acquisitions" was defined as the "process of acquiring title, either legal or equitable to the real property" (App. 144a). The estimated 200 acquisitions in Project B had taken place prior to August 23, 1968 (App. 147a). Within the Triangle area, nine parcels had been acquired by August 23, 1968, and nineteen acquisitions had been completed by the time of trial (Pl. Ex. No. 4).

[11] Under prior law the Secretary could reimburse the State as part of the construction cost of the highway, in limited amounts of up to $200 in the case of an individual or family, and $3,000 in

By the explicit terms of the statute (23 U.S.C. (Supp. V) 504(b)), these payment provisions apply to any resident in a project area whose property had not yet been acquired by the date of enactment. Thus, the increased relocation payments have been made to all displacees who were still living in the two projects on August 23, 1968 (App. 183a–187a); petitioners have raised no issue of non-compliance with this aspect of the 1968 amendments (App. 204a–205a, 213a).

The amendments further provide (23 U.S.C. (Supp. V) 502) that the Secretary may not approve, for federal aid purposes, any Interstate highway "project" [12] submitted by a state "unless he receives satisfactory assurances from the State highway department" that the relocation payments described above, and relocation assistance programs complying with 23 U.S.C. (Supp. V) 508,[13] will be undertaken, and also that (23 U.S.C. (Supp. V) 502(3)):

> within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not

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the case of a business, for reasonable moving expenses (23 U.S.C. 133).

[12] The term "project" is defined in the statute as "an undertaking to construct a particular portion of a highway * * *" (23 U.S.C. 101).

[13] The relocation assistance program must include "such measures, facilities, or services as may be necessary or appropriate" (1) to determine the needs of potential displacees, (2) to assure, prior to displacement, the availability of adequate relocation housing meeting the Secretary's standards for "decent, safe and sanitary dwellings," (3) to assist in relocating displaced businesses and farm operations, and (4) to supply information concerning state or federal programs designed to assist displaced persons. 23 U.S.C. 508.

> generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

On September 5, 1968, the Department of Transportation issued Instructional Memorandum 80–1–68, setting forth revised policies and procedures to be followed under the new 1968 relocation amendments (see App. B 65–83, *infra*). With respect to Federal-aid highway projects authorized on or before August 23 1968, the Memorandum was applicable only to those "on which individuals, families, businesses, farm operations, and nonprofit organizations [had] not been displaced" (see App. B 66, *infra*). In addition, paragraph 5 thereof, calling for specific assurances from the State of an adequate relocation assistance program, was explicitly limited to the situation where no "authorization to acquire right of way or to commence construction [had] been given prior to the issuance of this memorandum" (see App. B 69, *infra*). Paragraph 7 of the Memorandum, providing for the preparation and submission by state highway departments of formal relocation plans, was similarly restricted to projects where such plans could be furnished to the federal division engineer "prior to proceeding with right-of-way negotiations and/or construction" (see App. B 73, *infra*).

In further explanation of these relocation planning provisions, the Department of Transportation issued a

circular on February 12, 1969, stating that "[i]n accomplishing the planning for the relocation program required under paragraph 7, the State should undertake such planning on all active projects to the extent that it is reasonable and proper" (App. B 86, *infra*). It noted, however, that the actual submission of a formal plan to the district engineer was necessary only "at any time an authorization is requested which would require * * * relocations" (App. B 87).

With respect to projects for which further authorizations were no longer needed, the circular stated (*ibid.*): "regardless of the information furnished at this stage of the project it is the responsibility of the State to furnish relocation assistance * * * in accordance with the requirements of law and the Im [Instructional Memorandum]." A subsequent circular, issued by the Department of Transportation on April 10, 1970, stated (see App. B 89, *infra*):

> The division enginer shall not authorize any phase of construction (clearance of right-of-way regardless of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

3. In the instant case, the record does not show the number of persons within the two projects who had relocated prior to the effective date of the 1968 amendments (App. 148a, 193a). Figures as of February 28, 1969, however, indicate that 913 persons within Project A had by then relocated, while about 380 persons still remained (App. 193a, 214a); in Project B, the number relocated as of that date was 401, with 496 persons remaining (App. 214a). Of the 326 persons originally residing within the Triangle area, apparently 42 had relocated by February 28, 1969 (which included 17 families (App. 100a)), and 284 still remained in the two project corridors (App. 148a, 194a–195a).[11]

None of those who had moved had been forced to do so (App. 377a–378a). To the contrary, the state policy had consistently been to relocate those who had to be displaced by the highway "[o]ver the period of time it takes to see that every one of them is offered safe and sanitary and decent housing so that no one is forced to move until they have these accommodations available" (App. 407a). To accomplish this objective, the state had, at the outset, "established a relocation office" within the Triangle area (App. 214a, 370a). According to the testi-

[11] A breakdown of these figures at trial (App. 194a–195a) showed that of the 284 persons then remaining in the Triangle area, 104 lived in the Project A right of way (thus comprising about one-third of the total number still in that corridor) and 180 lived in the Project B right of way (thus comprising a little over one-third of the total number remaining in that corridor). At the time of trial, there remained to be relocated in this area fifty-nine family units (App. 100a), eighteen of which were white (App. 380a), and 116 individuals (App. 100a).

mony of Mr. Colan, the Director of the Right of Way Division for the State Road Commission (App. 370a),[15] "nine to ten people [were] assigned full time to relocation"; two or three of these did "nothing but inspect" available rental housing to insure that "it is safe, decent and sanitary and conforms to the regulations." Moreover, the office had conducted a survey of the people residing in the two subject projects to learn "where they want to relocate, where they would like to move to, what their incomes are and family types, the business where they worked, where they go to church" (App. 370a). An "up-dated" listing "of all the housing * * * available for sale or rent" (*ibid.*) was maintained, and, if potential displacees were interested in seeing an available rental, the office would, if necessary, arrange to "pick them up in cars, take them and show them the property" (App. 371a). It would "make arrangements for any deposit they have to make to get in, [and] give them priority certificates if they want in public housing" (*ibid.*).

At trial, there developed an apparent controversy over whether there were sufficient available units of adequate replacement housing in the area. Testimony by petitioners' principal witness, Mr. Abeles, suggested a severe shortage of housing in Charleston (App. 299a). His as-

[15] The trial judge stated he was "very much impressed" by this witness and had "no hesitancy whatsoever in saying I think the State of West Virginia is quite fortunate to have him heading up this particular division." The judge added: "He indicated to me that he was a dedicated man who is carrying out a very, very difficult task in all good conscience and with a degree of solicitude for the impact that this program makes upon all people" (App. 439a).

sessments were based on a 1960 census report showing a 2.7 percent effective vacancy rate for the area,[16] which signified, he said, that "in effect you have no relocation housing on the private market, on the total market available" (App. 299a). It was his opinion that between 1960 and 1966, this housing problem "had increased in severity" (App. 299a–300a). He also testified that, essentially on the basis of the 1960 census figures (App. 317a), he had formed the opinion that the housing market in Charleston was racially closed ((App. 305a).[17] He admitted, however, that the figures on which he relied had been prepared at a time when the City of Charleston did not have an open housing ordinance (App. 317a).[18]

[16] The "effective vacancy rate" was described as the "number of units from the total stock which are empty, which are actually available, not counting those which are vacant but ready to be torn down or vacant but leased to somebody else or vacant and seasonal housing but actual number of units which a person can go and shop for on the open market" (App. 299a).

[17] This conclusion rested largely on information shown on a "map of the City of Charleston, West Virginia," prepared by this witness, which was based on "the United States Census, 1960" (App. 304a–305a).

[18] The Charleston Human Rights Act (City Ord. No. 975, Art. 79, Pt. 9, Streets and Public Services Law) was passed on November 6, 1967. It prohibits, *inter alia*, discrimination against any person because of "race, religion, color, national origin or ancestry" in the sale or rental of "any housing accommodations or real property or part or portion thereof" (Section 9(g)). It excepts from this provision "(A) the rental of a dwelling, or a portion thereof, containing accommodations for two, three or four families, one of which accommodations is maintained by the owner at the time of rental as the household of his family or (B) the rental of a room or rooms in a single family private dwelling or room in any apartment sublet by the owner or tenant of said apartment to another person or persons by the owner or occupant of such accommodation in which he or members of his family reside." Sec-

Testimony by the state highway officials, on the other hand, presented quite a different picture. On the basis of a study undertaken in February 1969 (App. 99a–126a, 363a), the turnover rate for three public housing projects in the Charleston area exceeded 25 percent in both 1967 and 1968[19] (App. 253a). In addition, at the time of the study a combined total of "approximately 250" (App. 368a) single rooms were available at acceptable rates in six hotels (App. 113a–114a), each "within a mile of the Triangle district" (App. 368a).[20] And some 80 more private units were generally available for occupancy on any given day (App. 101a, 195a, 367a, 395a), at an approximate average monthly rental of $90.00 (App. 112a).[21]

Mr. Mozena, the Executive Director of the Charleston Housing Authority, testified that the rent charged per unit in the three public housing projects was set at 20

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tion 3(k); see State Resp. 1a App. This open housing law is thus virtually identical in its coverage to the similar federal statute enacted in 1968. 42 U.S.C. 3601 *et seq.*

[19] The total number of turnovers for the three projects exceeded 230 units each year (App. 264a–267a). In 1967, the turnovers were 30 one-bedroom, 148 two-bedroom, 36 three-bedroom and 31 four-bedroom units; in 1968 the breakdown of turnovers was 27 one-bedroom, 133 two-bedroom, 30 three-bedroom, and 29 four-bedroom units.

[20] All the rooms met the decent, safe and sanitary housing standard (App. 396a). Four of the six hotels did not lie within the proposed Urban Renewal Project for the Triangle area (App. 396a). The other two were included in the 1969 study because the Urban Renewal Project was then still in the planning stages and there seemed "nothing very encouraging about its immediately appearing" (App. 397a).

[21] The 1969 study also indicated the number of houses that were listed for sale in and around the Charleston area, ranging in price from $5,000 to $25,000 and higher (App. 115a–126a).

percent of the family's net income, with a minimum rent of $25.00 (App. 254a). Available units were assigned on a priority basis which, "as a practical matter," he said (App. 253a), gave "displacees from the highway development" a first priority.[22] At the time of trial, the evidence showed that highway displacees had the top priority and were expected to retain it in the near future (App. 252a–253a).[23] On this basis, Mr. Mozena testified that the waiting period for such housing for those applying from the Triangle area would be "thirty to sixty days" (App. 253a). He further stated that in selecting tenants for any of the three housing projects, there could be "no discrimination because of race, color, creed or national origin" (App. 253a). Mr. Colan, the Director of the State Right-of-Way Division, testified that on the basis of his "experience in relocating people in

[22] The order of displacement priorities is as follows: "(1) displaced by natural disaster; (2) a low-rent housing project; (3) a public slum clearance; (4) redevelopment or renewal project; (5) public roads, bridges, et cetera; (6) enforcement of housing codes; (7) servicemen or servicemen's families, the head of which has been reassigned; (8) other families" (App. 250a).

[23] Petitioners' principal witness, Mr. Abeles, took issue with this analysis on the ground that a hypothetical 150 families might be displaced each year by "natural disaster" (App. 321a) and another large number might be displaced by "new public housing" (App. 326a); all such displacements, if they in fact occurred, would, of course, have priority over highway displacements. The proposed urban renewal plan had not been approved for the Charleston area at the time of trial (App. 397a); however, subsequent to proceedings in the district court, an urban renewal plan was approved by the Department of Housing and Urban Development and we are advised that acquisitions of property under that plan are just now beginning.

Charleston, relocating about 2,000 total in the last two years," he had not found "any significant racial discrimination in Charleston" (App. 393a).

Drawing on that experience, and on the 1969 study of available housing in and around Charleston, Mr. Colan concluded that "there is no serious problem involved in relocating all individuals and families from the Triangle area in accordance with the new 1968 Highway Act into accommodations that meet all of its specifications * * * [a]nd all of its regulations" (App. 369a). Mr. Saunders, the Division Right of Way Officer of the Bureau of Public Roads, shared this opinion. He testified that his office had reviewed approximately 512 relocation cases on some fifty highway projects in the State of West Virginia in 1967 and 1968 and had "generally found the relocation aspects to be completely adequate in all respects" (App. 210a). On the two projects discussed here, his office reviewed "a combined total of approximately 125 relocations and [was] satisfied with those" (*ibid.*).[24] While all these relocations were under the 1962 Act, Mr. Saunders emphasized that the State Road Commission "was providing all that was required and probably then some * * *" (*ibid.*). He stated: "I personally consider it in total as a very progressive right of way department * * * their relocation section is particularly aggressive" (App. 212a). And, he added, "I don't believe we ever took exception to a

[24] The number of cases reviewed by Mr. Saunder's office appears to be 133. In Project A, 75 relocation records of the state were reviewed; in Project B, 48 relocation records were reviewed (App. 182a).

"single relocation" (App. 213a). On this basis, he concluded (App. 176a):

> They have to my satisfaction, based on the two years' experience that I have had in this office closely watching their whole right of way operations, satisfied me that they can relocate the people in the Triangle area and other areas.

4. No state assurances specifically relating to Projects A and B on highway I–77 were furnished to the Secretary under the 1968 Highway Act, or under Paragraph 5a of the implementing Instructional Memorandum (App. 203a).[25] Also, no formal relocation plan for either project was submitted under paragraph 7 of the Instructional Memorandum (App. 198a, 209a, 415a).[26]

The district court held that the failure to provide such information violated neither the statute nor the regulations. It concluded (App. 54a–55a) that "Congress could not have intended that projects authorized and approved several years prior to enactment of the 1968 statute were to be subject to inflexible and strict compliance therewith." It also noted (App. 55a) that the federal officials had explicitly de-

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[25] The state did furnish, on request from the Bureau of Public Roads, general assurances concerning the statewide relocation program in West Virginia, but they did not relate specifically to either of these projects (App. 204a–206a).

[26] Prior to enactment of the 1968 legislation, the state prepared and submitted to the Bureau of Public Roads a survey relating to persons to be dislocated in the Charleston area, but it did not contain information relating to the availability of replacement housing (App. 167a–168a). Such information was later submitted in 1969 (App. 99a–126a), but this study related only to the Triangle area (App. 209a, 379a) and was not intended as a "Paragraph 7" relocation plan for either of the two subject projects.

termined "that the West Virginia authorities can meet, are meeting, and will continue to meet the requirements of the regulations and statutes in its relocation program."

The court ruled that that program suffered no constitutional infirmity under the Fifth and Fourteenth Amendments. It specifically held that "[t]he evidence indicated that adequate relocation housing, on an open racial basis, will be available in the Charleston area for an orderly relocation of the displacees from the interstate highway corridor" (App. 57a). Thus, petitioners' "allegations relative to the relocation assistance program on both statutory and constitutional grounds" were rejected as "without merit" (App. 59a).

The court of appeals affirmed *per curiam* (App. 65a–66a), and denied a petition for rehearing *en banc* (App. 71a), two judges dissenting (App. 72a–78a).

5. Subsequent to the proceedings in the district court, the petitioners who at that time still remained within the right of way corridors of Projects A and B (*supra*, p. 12) proceeded, with the assistance of the State Road Commission, to relocate outside the highway area. At the present time, we have been advised that this aspect of the relocation program is virtually completed. Of the original 284 persons to be displaced, apparently only 9 individuals remain on the two projects, representing less than four percent of the total displacement;[27] more-

[27] All relocations have taken place without the institution of a single eviction proceeding.

over, we are advised that only 3 or 4 of those remaining have yet to find suitable relocation housing. On November 6, 1970, Under Secretary of Transportation Beggs announced that "[t]he demolition of buildings in the Triangle Area in order to prevent vandalism, occupation by squatters, and in the interest of public health, may be authorized at the discretion of the Division Engineer as the relocation of persons is accomplished". (Pet. Br. App. B, p. 46). We are advised that substantially all the vacant dwellings have now been demolished in the Triangle area and that there remain standing in that part of the highway corridor (including both projects) 13 structures, only 5 of which are still occupied.

SUMMARY OF ARGUMENT

Petitioners instituted this suit to enjoin construction of two federally-funded Interstate highway projects within the Triangle area of Charleston until the state submitted to federal authorities a satisfactory formal plan of relocation for those to be displaced. There were then 284 persons within the approved right-of-way corridors who lived within the Triangle. The state has since helped to relocate virtually all of these individuals and we are advised that there now remain but 9 persons to be displaced, only 3 or 4 of whom have yet to locate adequate relocation housing.

In the changed posture of this case, the issues relating to the proper construction of the Federal-Aid Highway Act of 1968, and regulations thereunder, have become largely academic and there is no occasion for this Court to resolve them. If, as petitioners claim, some persons have been moved into inadequate housing, ques-

tions relating thereto can be litigated in some other proceeding.

I

The constitutional question petitioners raise under the Fourteenth Amendment is dependent on their assertion that adequate relocation housing will not in fact be available in Charleston on an open racial basis. The district court explicitly ruled to the contrary and the court of appeals affirmed on the opinion of the district court. While the record shows a few instances of private racial discrimination in the housing market in Charleston, it does not show or even suggest state involvement in such activity. To the contrary, both the City of Charleston and the Congress of the United States have enacted legislation designed to prevent and alleviate private discrimination in housing. There is, consequently, no substantial constitutional issue in this case.

II

Petitioners' contentions regarding the necessity for submission of a formal relocation plan for these projects involve only the applicability of certain provisions of a Department of Transportation memorandum to projects under way when the statute was passed in August 1968. That memorandum, by its terms, requires such plans only with respect to projects in which significant displacement of persons had not taken place prior to the effective date of the 1968 legislation. This is the interpretation given to the pertinent language by those federal officials who participated in drafting the underlying policy. It is supported by, and entirely

consistent with subsequent Department memoranda relating to procedures to be followed in providing relocation assistance to prospective displacees.

On the two projects here in question, the route had been finally approved, the right-of-way in each corridor partially acquired and a number of persons already displaced by August 1968. Even without a formal plan, the State Road Commission had been providing to displacees, both within the Triangle and outside it, essentially all relocation benefits required under the 1968 amendments. There is therefore no basis in law or fact for granting petitioners the relief they now seek.

ARGUMENT

INTRODUCTION

The posture of this case has changed drastically since the suit was instituted more than two years ago. At that time there were approximately 876 persons living within the approved rights-of-way of the two state "projects" involved in the Charleston section of highway I–77; 284 of them were residing within the Triangle area. The state relocation program has since successfully relocated substantially all of these individuals,[*] and there now remain but 9 persons in the Triangle to be displaced, only 3 or 4 of whom have yet to locate adequate relocation housing (*supra*, pp. 19–20).

The issues litigated in the district court and raised again here relate solely to whether, on state highway

[*] The total number of persons displaced on these two projects to date is approximately 2,084; 1,314 of these had relocated at the time the case was tried in the district court (*supra*, p. 12).

Projects A and B, the State Road Commission was required under the 1968 statute and regulations to submit to federal authorities a formal plan of relocation. In the present circumstances, these questions are largely academic; even petitioners no longer seriously contend that such a plan is needed for the handful of persons remaining in the Triangle area (Pet. Br. 50–52). This Court has consistently declined to adjudicate constitutional and statutory issues in the abstract (see, *e.g.*, *Ashwander v. United States*, 219 U.S. 346; *Poe v. Ullman*, 367 U.S. 497, 503–504) or where developments after initiation of the action have eliminated the need for further judicial inquiry (see, *e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 108–109; *Fortson v. Toombs*, 379 U.S. 621). As this Court explained in *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 264, review is appropriate only "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy * * *." Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345–348 (Brandeis, J., concurring). Even where the issues originally presented may not technically be moot,[29] there is reason to invoke this "principle of prudent restraint" (*Sanks v. Georgia*, No. 23, this Term, decided February 23, 1971, slip op. 8) where it appears unlikely that further adjudication "would now be material to any further litigation that might ensue" in related proceedings (*id.*, slip op. 6).

This case does not challenge activity of state or federal officials which is by nature continuous or recurring.

[29] Arguably, the issues in the instant case will not be moot until the last person to be displaced from the Charleston section of the highway I–77 has relocated.

Compare *Carroll* v. *Princess Anne*, 393 U.S. 175, 178–179. It attacks only specific procedures followed in the planning stages of a particular relocation program, identified with a particular federal-aid highway project.[30] At most, the issues retain vitality only as long as there remains a need for the type of planning petitioners now seek: the projects, however, are well beyond that point. Petitioners concede that the question "whether people have been relocated to decent, safe, and sanitary housing as required by federal statute" (Pet. Br. 17 n. 49) is not in this case.[31] If, as petitioners seem to suggest (Pet. Br. 51), some Triangle displacees have actually been moved "into demonstrably inadequate housing," that is a factual issue to be resolved in separate proceedings in the district court. It should not now be litigated in the instant suit involving different issues and different parties. We seriously doubt that the Department of Transportation would be a proper

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[30] As a practical matter, the issue is a nonrecurring one of diminishing importance. As petitioners correctly point out (Pet. Br. 28–29), of the 9,000 miles of the Interstate highway system not fully constructed, or under construction, in August 1968, 8,500 miles were then either in the engineering design stage or had just begun the right-of-way acquisition stage (see *infra*, pp. 34–36); right-of-way acquisitions had not yet commenced nor had people been displaced on the projects comprising substantially all of this 8,500 miles of unfinished roadway as of the effective date of the 1968 amendments. As to those projects, therefore, there can be no question as to the applicability of the statutory and regulatory provisions requiring state assurances and a formal plan of relocation.

[31] This case is thus unlike *Shannon* v. *United States Department of Housing and Urban Development*, C.A. 3, No. 18297, decided

party defendant to such proceedings;[32] nor do we believe that the class of complainants would be identical to the class represented by petitioners at the present time.[33]

In these circumstances, we submit that it would be inappropriate for this Court to adjudicate the complex issues originally raised by this case and which petitioners still argue.[33a] As long as any persons still remain to be displaced from the Triangle area, however, the case is technically not moot, and we cannot now know when such displacement will be completed. Accordingly, we set forth our reasons for believing that the actions of federal and state authorities here under attack complied with the 1968 amendments to the Federal-Aid Highway Act, and the regulations thereunder.

December 30, 1970, on which petitioners place some reliance (Pet. Br. 52). There, the issue relating to the execution and performance of a contract for rent supplement payments to tenants of a specific apartment project was raised in the complaint, notwithstanding that the apartment had not then been built (slip op. 2).

[32] In a suit relating solely to questions of adequate relocation housing, it is the state, and not the federal government, which bears the ultimate responsibility.

[33] The instant case is a class action brought on behalf of all persons who, at the time the suit was commenced, were residing within the interstate corridor in the Triangle area of Charleston, West Virginia (App. 130a–131a)—approximately 284 persons.

[33a] As we have indicated (*supra* n. 1), the Uniform Relocation Assistance Act of 1970 repealed the statutory provisions here under consideration. While certain provisions of the new Act contain language similar to that involved in this suit, there is sufficient dissimilarity to raise doubts whether a decision in this case, insofar as it bears on the construction of the repealed statute, would be controlling on the proper interpretation of the Uniform Relocation Assistance Act of 1970 (see n. 43 *infra*).

I. THE EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT ADEQUATE RELOCATION HOUSING IS AVAILABLE ON AN OPEN RACIAL BASIS IN THE CHARLESTON AREA

A. Petitioners' constitutional claim rests upon factual assumptions that both courts below properly rejected. They contend (Pet. Br. 24–25) that the failure to assure Negro displacees, prior to their displacement, that adequate relocation housing is available in the Charleston area on a non-discriminatory basis violates the Equal Protection Clause of the Fourteenth Amendment.[24] The argument is premised on the sweeping statement that "construction of I–77 through the Charleston Triangle has had and will have the effect of displacing black and poor residents of the area and throwing them into a highly constricted, racially discriminatory housing market" (Pet. Br. 24).

Even if this were the case, the constitutional objection relates more appropriately to the government's approval in 1964 to route the highway through this area (cf. *Nashville I–40 Steering Committee* v. *Ellington*, 387 F. 2d. 179, 185 (C.A. 6), certiorari denied, 390 U.S. 921), a decision which petitioners are barred by laches from challenging (*supra*, p. 5). In any event petitioners have done no more than state an adequate claim on which relief can be granted (see *Norwalk*

[24] The record does not reflect what preliminary assurances were in fact made to the residents of the Triangle area. It does reveal that Mr. Colan, Director of the State Right of Way Division, met with Triangle Improvement Council in June 1965, and again in 1966 to discuss the relocation program, and thereafter, on at least two occasions with the Council president and others to discuss "how relocations would be handled" (App. 408a–409a).

CORE v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 929–930 (C.A. 2); *Arrington* v. *City of Fairfield, Alabama*, 414 F. 2d 687, 692–693 (C.A. 5)); they have not, however, proven their claim.

B. As earlier indicated (*supra*, p. 14), on November 6, 1967, the City of Charleston passed a local ordinance prohibiting, with limited exceptions (*supra*, n. 18), sales or rentals in the city housing market on a racially discriminatory basis.[35] There is nothing in this record to suggest, even inferentially, any significant non-compliance with that law; nor is there any indication that local authorities were having difficulty with its enforcement. Petitioners' analysis of the Charleston housing market does not discuss the post-ordinance period, and they concede that they never made a study of public, as distinguished from private, housing to determine the extent, if any, of racial discrimination (App. 344a, 391a–392a).

[35] While there was then a similar federal law (42 U.S.C. (Supp. V) 1982), it was uncertain whether it covered purely private discrimination in the sale or rental of real property, unaided by any governmental action, until this Court decided *Jones* v. *Mayer Co.*, 392 U.S. 409, in June 1968. *Jones* preceded the effective date of the statutory and regulatory provisions here in question by a full two months. Moreover, on April 11, 1968, Congress had enacted the Fair Housing Title (VIII) of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, prohibiting all discrimination, whether based on race or otherwise, in the sale or rental of housing. Thus, the amorphous "assurance" sought by petitioners in this case is that federal or state officials will uphold and enforce the existing law. Their failure *in fact* to do so may in certain circumstances violate the Equal Protection Clause; but their failure to *say* they are going to do so does not.

Instead, their major focus at trial was on the housing situation in Charleston almost eight years before this action was commenced. Their conclusions rested largely on information shown on a map (Pl. Ex. No. 23) prepared by their principal witness, Mr. Abeles, based exclusively on 1960 census figures (App. 304a, 317a). According to Mr. Abeles (App. 305a), "[w]ith the addition of other knowledge and from readings I have, this map would give a reasonably clear picture that the housing market in this city at the point from which these numbers were made was a restricted housing market."[36] Petitioners assume that this same situation still existed almost nine years later, more than a year after enactment of the open housing ordinance, based on a single telephone survey of about fifty private dwelling units within the Charleston area, only eight of which purportedly "would rent to black families" (App. 332a–333a):

[36] While Mr. Abeles relied in part on some later statistics, compiled between 1960–1966, and allegedly on some personal observations, in giving his views as to the general availability of adequate relocation housing in the Charleston area (App. 300a, 318a), he did not draw on these later figures to support his opinion that Negroes "would not enjoy the same—by any degree the same opportunities for finding relocation housing in the private sector" (App. 305a). In fact, the only other source for his opinions on racial discrimination was the April 1968 draft of the city Community Renewal Program (App. 233a), which, he stated, "goes into some detail to the specific problems of the black population of getting housing due to racial frictions and restrictions" (App. 304a). However, that draft (Pl. Ex. No. 14) deals essentially with the problems of racial discrimination in private housing well before the November 1967 city ordinance, and at the time of trial was "in the process of being revised because of changes that have been made in certain things" (App. 233a).

That survey, however, did not show that the remaining 42 owners discriminated on the basis of race. Rather, Miss Carolyn Tillman, a community organizer who made the phone calls at the behest of Triangle Improvement Council (App. 257a, 332a–332a), stated that "[t]he other homes were either too much rent per month *or* they wouldn't rent to black families *or* they were not large enough for families with children" (App. 334a; emphasis supplied).[37] Moreover, 28 of the dwellings in the survey had already been rented on the day Miss Tillman called (App. 334a), and apparently no effort was made to determine which, if any, of these had been let on a discriminatory basis. Consequently, the most that the survey shows is that 14 dwelling units were unavailable for rent by Negro families for one of the above three reasons. Moreover, as to the few of those which might actually have discriminated on the basis of race, the record is silent as to whether they were within the city ordinance exclusions (*supra* n. 18).

We do not suggest that there is no discrimination in sales and rentals of one-to-four family dwellings in the private sector of the housing market in Charleston (App. 392a). See also 42 U.S.C. 3603(b)(2). Indeed, Mr. Colan, Director of the State Right of Way Division, recognized the possibility of such discrimination. "The private room situation," he testified, "is a very

[37] In determining how many of the fifty dwellings were available for rent by residents of the Triangle area, Miss Tillman considered only those dwellings renting for less than $60 per month (App. 333a); she was not familiar with the rent supplement provisions of the 1968 Act (App. 340a).

delicate thing because each one has their own criteria for who they want living in their house" (App. 393a).[38] But he stated emphatically that otherwise he had been unable to "find any significant racial discrimination in Charleston" (*ibid.*), an assessment based on his personal experience in relocating approximately 2,000 persons in the area "in the last two years" (*ibid.*) and on his close working knowledge of the current state of the public and private housing market (App. 354a–362a, 392a). As to the public housing sector (App. 253a, 390a–391a), his statements has never been disputed in these proceedings (App. 392a). And, as the record shows (*supra*, pp. 15–16), at the time of trial public housing alone in Charleston was expected to have a turnover sufficient to supply appropriate replacement housing to all Triangle displacees (App. 102a, 105a–108a).[39]

On the basis of this evidence, the trial court properly concluded (App. 57a) "that adequate relocation housing, on an open racial basis" was available in the Charleston area. In affirming on the opinion of the district court, the court of appeals necessarily upheld that finding. Petitioners have shown nothing that would warrant this Court in taking the unusual step of overturning this factual determination of the two

[38] Mr. Colan stated that in determining whether there was sufficient private housing available, "[w]e consider the availability under the Charleston Open Housing Act [the city ordinance] and for such reasons we have eliminated, for example, the private room situation because it is very difficult to even rent a private room to anyone" (App. 392a).

[39] Petitioners' effort to discredit this evidence is discussed *infra*, pp. 46–49.

lower courts. Cf. *Graver Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275. It should not do so on the basis of an obsolete study prepared from 1960 census figures and a telephone survey which, if at all accurate, reflects no more than that there possibly existed some racial discrimination in Charleston by a few owners of private dwellings which might well have been exempted from the coverage of the open housing ordinance (see Pet. Br. 16 n. 46).

C. Accordingly, the character of the housing market in the Charleston area was not such that the state's implementation of its relocation program in that area necessarily resulted in discriminatory rental or sale practices for which the state could be held responsible. Individual instances of private discrimination based on race, even if unlawful (cf. *Jones* v. *Mayer Co.*, 392 U.S. 409), do "no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722; *Turner* v. *City of Memphis*, 369 U.S. 350. There is nothing on this record which even begins to suggest such involvement.[40] To the contrary, as indicated above, both the City of Charleston and the Congress of the United States have enacted legislation designed to prevent and alleviate private discrimination in housing. There

[40] As pointed out by the trial court, petitioners "have specifically disavowed that there was any basic or specific racially discriminatory purpose on the part of defendants in the routing of I-77 or in the relocation of the displacees in that routing" (App. 58a).

is, consequently, no substantial constitutional issue in this case, and this Court need only determine whether the Department of Transportation correctly construed the 1968 statutory amendments, and its own regulations thereunder, as not requiring state officials to submit further assurances in the form of a formal relocation plan for the questioned highway projects.

B. STATE OFFICIALS WERE NOT REQUIRED BY STATUTE OR REGULATIONS TO SUBMIT FURTHER ASSURANCES IN THE FORM OF A FORMAL RELOCATION PLAN ON THESE PROJECTS

A. On August 23, 1968, the Federal-Aid Highway Act (72 Stat. 1146) was amended[41] to require (1) more comprehensive and meaningful state "assurances" (23 U.S.C. (Supp. V) 502) of an adequate relocation program (23 U.S.C. (Supp. V) 508) as a condition to obtaining the Secretary of Transportation's approval[42] for federal funding of a proposed highway project, and (2) an increase in the number, kinds and amounts of relocation assistance payments (23 U.S.C. (Supp. V) 505, 506, 507) for those persons to be dis-

[41] Section 37 of the Federal-Aid Highway Act of 1968, P.L. 90-495 (set out as a note to 23 U.S.C. 502), provided that the amendments would take effect immediately except that until July 1, 1970, sections 502, 505, 506, 507 and 508 "shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections." The proviso has reference primarily to the relocation payment provisions and is not pertinent here. West Virginia, by an amendment in its laws, was in fact able to comply fully on March 7, 1969. W. Va. Code (1970 Cum. Supp.) Ch. 17, Art. 2A, Sec. 20.

[42] Approval for federal funding of any proposed highway project on the Federal-aid Interstate system is obtained under 23 U.S.C. 106; similar approval for proposed projects on the Federal-aid secondary system is obtained under 23 U.S.C. 117.

placed from any highway project after the effective date of the 1968 Act (23 U.S.C. (Supp. V) 509). The legislative history shows that these provisions were needed primarily because general requirements of a similar nature under the 1962 Act (23 U.S.C. 133; *supra*, nn. 7–11) had not been effective "in providing adequate relocation assistance and just compensation to those displaced * * *." S. Rep. No. 1340, 90th Cong., 2d Sess., p. 6.

The new statute calls for "satisfactory assurances" from the state that it will afford to displacees of a federal-aid highway project three things: relocation payments, relocation assistance, and "decent, safe and sanitary" relocation housing (23 U.S.C. (Supp. V) 502). The exact form that these assurances were to take, and their precise content, were left to the Secretary (23 U.S.C. (Supp. V) 510(b)), who also was assigned the task of defining the prescribed housing standard (23 U.S.C. (Supp. V) 502(3)).

As we earlier indicated, the implementing regulations were issued on September 5, 1968, in the form of Instructional Memorandum 80–1–68 (hereinafter referred to as "IM"), effective as of August 23, 1968 (App. B 63–83, *infra*). In essence, they require that (a) detailed information be submitted in certain circumstances concerning the availability of adequate relocation housing on a non-discriminatory basis, (b) an assurance be given that "to the maximum extent practicable" no person will be displaced without at least 90 days prior written notice, and (c) a promise be made to comply with all relocation payment provisions. See IM, para. 5, *infra*, App. B 67–69. In addition, there

is a numbered paragraph outlining a comprehensive relocation planning program to be followed by the states and calling for submission to the federal division engineer, for his review and approval, of a detailed formal plan of relocation with respect to each proposed project. See IM, para. 7, *infra*, App. B 72–74. The Memorandum also sets forth the minimum requirements for "decent, safe and sanitary" housing. See IM, para. 13, *infra*, App. B 79–81.

B. In order to appreciate fully the nature of the present controversy, an understanding of basic procedures followed in constructing any portion of the federal-aid highway system seems essential. Briefly, the building of any section of federally-funded roadway (designated a "project") involves four successive stages. There is, at the outset, the "program" stage, during which a state desiring financial assistance is to "submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned" for any fiscal year (23 U.S.C. 105). The Secretary's approval of any "program" does not bind the government to a contractual obligation.

Next is the "routing and engineering design" stage. During this period, the state selects the different project routes (23 U.S.C. 103(d)) and prepares, for the Secretary's review and approval, "such surveys, plans, specifications and estimates for each proposed project included in an approved program" as relate to the route location and design. Moreover, it is in this stage, prior to "such time as the final location is

approved" (IM, para. 7a, *infra*, App. B 73), that the state is required under the 1968 regulations to "make preliminary investigations" incident to planning for a relocation program. *Ibid.* Where the selected route involves "the bypassing of, or going through, any city, town, or village," the state must hold public hearings and consider "the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community * * *" (23 U.S.C. (Supp. V) 128(a)).

If the Secretary is satisfied with the information he receives, he first approves the route location and thereafter the design as part of the approval under Section 106; even after such approvals, there is still no contractual obligation on the part of the government to expend funds for right-of-way acquisitions or project construction.

The "right-of-way acquisition" stage follows. By regulation, right-of-way surveys, plans and specifications are then filed with the federal government. *FHWA Policy and Procedure Memorandum* 20-5. Pursuant to the 1968 amendments (23 U.S.C. (Supp. V) 502), and paragraph 5 of the IM issued thereafter, the state must submit "satisfactory assurances" that it can provide prospective displacees with adequate relocation housing and payments. Also, under paragraph 7 of the IM, "prior to proceeding with right-of-way negotiations and/or construction," a state is now required to prepare a detailed plan of relocation "for review and approval by the division engineer" (*infra*,

App. B 73–74). If the division engineer is satisfied, authorization to purchase parcels of land within the project right-of-way is given under 23 U.S.C. 106, and the government is then contractually obligated to participate in such acquisitions; generally this authorization will cover the entire project area, but occasionally, as in the instant case (App. 230–231a), it may be a segment authorization, or even a parcel-by-parcel authorization (App. 230a).

It is during the right-of-way acquisition stage that a state is required to implement its relocation programs. First, adequate "decent, safe and sanitary" housing is located; then the parcels of land are purchased; finally, those to be displaced are moved. There is no set deadline. As amply demonstrated by the instant case, "no one is forced to move until they have these accommodations available" (App. 407a). While right-of-way clearance generally does not take place during the relocation process (see *FHWA Policy and Procedure Memorandum* 21–12), the demolition of vacant buildings may at this stage be authorized by the division engineer where he deems such action is necessary "in order to prevent vandalism, occupation by squatters, and in the interest of public health" (Pet. Br. App. 46).

Finally, there is the actual "construction" stage (*FHWA Policy and Procedure Memorandum* 21–7), which is to "be undertaken by the respective State highway departments or under their direct supervision" (23 U.S.C. 114). The construction of each project is generally to "be performed by contract awarded

by competitive bidding" (23 U.S.C. 112). It cannot commence without federal authorization from the division engineer. While this authorization is an approval under 23 U.S.C. 106, creating a contractual obligation by the federal government to participate in construction costs, it is not the Section 106 approval talked about in 23 U.S.C. (Supp. V) 502—that is, an approval "which will cause the displacement of any persons, business or farm operation." Construction authorization can be given only after persons in the area have been displaced pursuant to the earlier Section 106 approval in the right-of-way acquisition stage. This was made clear in a circular memorandum issued by the Department of Transportation on April 10, 1970 (*infra*, App. B 89), prohibiting the authorization of:

> * * * any phase of construction * * * which would require displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

C. The instant case involves two separate highway "projects" in the West Virginia Interstate "program," both of which penetrate the Triangle area of Charleston (*supra*, pp. 6–7). On August 23, 1968, the date of the 1968 amendments, each was well into the third stage outlined above: the route location had been finally approved (App. 357a) and full authorization had been given for right-of-way acquisitions un-

der Section 106 (App. 199a, 229a–231a); parcels of land had been purchased (App. 143a–144a, 147a–148a) and a number of persons had already been displaced (App. 145a). By the time this action was commenced, more than 60 percent of the right-of-way in both Project A and Project B had been acquired and 1,314 of the combined total of 2,190 persons had relocated (*supra*, pp. 7–8, 12).

Under such circumstances, it is our position that the state "assurances" to be submitted under section 502 of the 1968 Act before "[t]he Secretary shall * * * approve any project under section 106 or section 117" (see n. 42 *supra*) were not required.[43] Indeed, the statutory language suggests that no "assurance" was necessary after August 31, 1964; for, while separate federal authorizations—relating to right-of-way ac-

[43] Petitioners, in their supplemental brief, make reference to the Uniform Relocation Assistance Act of 1970. To the extent that statute has any application to these proceedings, it fully supports our position. In Section 210 (Pet. Supp. Br. App. 6), the Act requires "satisfactory assurances" along identical lines to those prescribed in 23 U.S.C. (Supp. V) 502. Those assurances must be furnished by a state to the head of a federal agency, not prior to construction approval, but prior to approval of "any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in * * * displacement * * *"—in short, prior to Section 106 right-of-way acquisition approval under the Federal-Aid Highway Act.

Petitioners' reliance on Section 205(a) of the Uniform Relocation Assistance Act of 1970 is misplaced. That provision (Pet. Supp. Br. App. 4) deals only with programs and projects "undertaken by a Federal agency in any State." Here, the projects in question are being "undertaken" by the state with federal financial aid. See 23 U.S.C. 114. Accordingly, if any provision of the Act is applicable, it is Section 210 (see n. 47 *infra*).

quisitions and, later, commencement of construction—were at that time still to be obtained, the Secretary had then finally approved the route location under Section 106 (*supra*, p. 6). The Department of Transportation, however, does not take this view of the statute; instead, it applies the provision to "[a]ll Federal-aid highway projects authorized on or before August 23, 1968, on which individuals * * * have not been displaced." See IM, para. 2(b)(2), *infra*, App. B66. Thus, with respect to specific state assurances of an adequate relocation assistance program, the regulations provide that they will be required *except* "where authorization to acquire right-of-way or to commence construction has been given prior to" August 23, 1968. IM, para. 5b, *infra*, App. B69. Even where the "assurances" are not compelled, however, the state is still instructed to "pick up the sequence at whatever point it may be in the acquisition program" (IM, para. 5b, *infra*, App. B69) and provide relocation assistance to those not yet displaced. (App. 192a, 417a).

On the two projects here involved, authorization had been given and individuals displaced prior to the effective date of the 1968 statute and regulations. Mr. Saunders, the Division Right of Way Officer, testified that federal authorities had therefore concluded that the state was not required to submit the statutory assurances "because it was a going project" (App. 191a); as he explained, "we had authorized [right-of-way acquisitions] way back" and the state had already commenced its relocation assistance program (App. 192a).

Petitioners do not appear to be challenging this aspect of the administrative determination; they are silent with respect to the statutory "assurances." Rather, their attack centers on the failure of state officials to furnish to the division engineer a formal plan of relocation (Pet. Br. 30–32), a requirement not called for by the statute but appearing only in the Department of Transportation's regulations (IM, para. 7, *infra*, App. B 73–74). The submission of such a plan, however, is required "prior to proceeding with right-of-way negotiations and/or construction" (IM, para. 7b, *infra*, App. B 73), a time long since passed on each of these projects. Curiously, petitioners rely on the "and/or" reference in an attempt to create the very ambiguity it was designed to eliminate (Pet. Br. 33 n. 78). As they read the regulation, the requirement for a formal relocation plan need not be imposed upon the states until the project nears the "construction" stage. However, as we have pointed out (*supra* pp. 36–37), by that time there is no longer any need for a relocation plan. Thus, it was precisely to foreclose such an argument by the states that the Department chose to use the pervasive "and/or" reference; relocation plans under IM, para. 7b are to be furnished "prior to proceeding with right-of-way negotiations."

This point was made abundantly clear in an explanatory circular memorandum issued on February 12, 1969 (see *infra*, App. B 86–87). It instructed each "division engineer to carefully review the status of each project before issuing any additional authorizations to acquire right-of-way * * *." If he

finds "a substantial number of persons remain to be relocated *at any time an authorization is requested which would require such relocation,* it would seem that the division engineer would need to have the information required by paragraph 7b" (see App. B 87, *infra;* emphasis supplied). Here, however, as Mr. Saunders testified (App. 198a), no such request for "right of way authorization to acquire" needed to be made "on these two projects after the effective date of the law, August 23, 1968." Therefore, he was of the view (App. 226a–227a), as were the other state and federal officials who testified (App. 142a, 385a, 415a), that the requirement of a formal relocation plan was not applicable to these projects.

Petitioners attempt to read the circular memorandum of April 10, 1970 (App. B 88–89, *infra*) as suggesting a contrary conclusion. On its face, however, that directive relates only to the commencement of the final "construction" stage, when displacement procedures are all but completed. It does not compel the submission of "comprehensive relocation plans * * * before construction approval" (Pet. Br. 36), as petitioners argue. Rather, it instructs the division engineers not to authorize any "phase of construction" which would have the effect of displacing any person remaining in the right-of-way, "until such time as the person being relocated has either by himself obtained * * * adequate replacement housing" or the state is able to offer him such "housing which is available for immediate occupancy" (App. B 89, *infra*). It is undisputed that this circular, by its terms, is applicable to the instant projects "on which individuals or families

are still to be displaced as of May 1, 1970" (App. B88, *infra*). Cf. *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268.[44] But this does not conflict with, or alter the effect of, prior Department regulations relating to the submission by states of a formal relocation assistance plan early in the "right-of-way acquisition" stage of an already approved project.[45]

That policy had been under discussion within the Department of Transportation "since basically before the law was signed by the President" (App. 415a). It was the subject of numerous meetings among, and reflected the views of, "top highway officials" of the states and the Bureau of Public Roads (App. 415a–416a). Mr. Carpenter, one of the federal officials who

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[44] Pursuant to the April 10 directive, Under Secretary Beggs announced on November 6, 1970: "(3) Further construction involving the Triangle Area will be authorized only after the people now living within the right-of-way in that area have been relocated into adequate decent, safe and sanitary housing * * *" (Pet. Br. App. 45–46).

[45] We, therefore, do not agree with the interpretation which Judge Sobeloff, dissenting from the denial of a petition for rehearing *en banc*, gave to "the panel's view as I infer it to be" (App. 77a). In his opinion, "my brethren seem to think that the regulation, expressly recognizing the plaintiffs' rights under the 1968 amendments, has somehow eliminated the need for relief. Their position apparently is that there is no reason to suppose that the new policy will not be applied to the Triangle and, accordingly, appellants' claim is thus mooted, at least for the time being" (App. 77a–78a). There is, of course, no dispute that the April 10, 1970, circular applies to the two projects here in question, both within the Triangle and outside it (*supra*, n. 44). The court of appeals, however, affirmed on the opinion of the district court; apparently it saw nothing in the later circular which required a different result.

was instrumental in formulating the regulations and who actually assisted in writing "[t]he basic policy itself" in Washington (App. 416a), gave the following explanation at trial for the underlying rationale, (App. 417a):

> This basic problem did exist in every state in the Union. If they had to stop operations, back up and basically consider attempting to make a memorandum retroactive, if you tried to enforce all of these provisions of the IM on projects on which a substantial amount of work had already been done, it would have been unfair to the public to have stopped the work on that when they were expecting to get paid and you take your people off and start a relocation plan. Somewhere we have to stop the planning and start doing.

As he interpreted the regulation which he had helped to draft (App. 417a–418a), a relocation plan for these two projects "wasn't required" (App. 415a). When asked why, he responded: "The specific language of this IM and the attachments thereto preclude the necessity of a requirement for a relocation" plan (*ibid.*). And he added, "I have no reason to believe that this has been misinterpreted" (416a). Even assuming *arguendo* some ambiguity in the regulation, the guiding principle is that enunciated in *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413–414:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * But the ultimate criterion is the

> administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. * * *

See also *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 276.

Nor can petitioners produce a different result by characterizing the question as one of the construction of a statute rather than a regulation. As we have shown (*supra*, p. 40), the statute requires no formal plan of relocation.[46] But even if it did, the administrative interpretation would still be determinative; it would involve "a contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

D. Petitioners contend, however, that not to require a formal plan of relocation here would "defeat the obvious intent of Congress" (Pet. Br. 29). Compare *Zuber* v. *Allen*, 396 U.S. 168. We cannot agree. Again the proper focus is on the realities of the situation, on the essential, uncontested fact that the state's relocation assistance program for each of these projects was already well under way on August 23, 1968 (*supra*, pp. 7–8, 12). As Mr. Saunders testified, to have suddenly stopped everything would have created

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[46] Similarly, the Uniform Relocation Assistance Act of 1970 (see n. 43, *supra*) contains no provision calling for submission by a state to the federal government of a formal plan of relocation. See Pet. Supp. Br. App.

"hardships for those people who [had] already gotten started towards buying new property" (App. 191a). It would, according to Mr. Colan (App. 386a), have entailed "taking the personnel off of helping the people to go back and write lengthy reports reporting data which was well known as a result of [the state's] continuing studies."

This is not what Congress intended when it passed the Federal-Aid Highway Act of 1968; the overriding concern was not with formalism. Instead, as stated in the "Declaration of policy" (23 U.S.C. (Supp. V) 501), Congress wished to achieve "the prompt and equitable relocation" of persons displaced by federally funded highways. As the evidence in this case demonstrates, that is precisely what was taking place on projects A and B in Charleston, notwithstanding the absence of a formalized plan to accompany the extensive relocation program.

Indeed, the state's central relocation office, situated in the Triangle area of Charleston (App. 214a–215a), had been affording to displacees on both projects substantially all the services now enumerated in 23 U.S.C. (Supp. V) 508 long before August 23, 1968 (see pp. 12–13, *supra*).[47] For two years, its right-of-way operations had been closely observed by the Division Right-of-Way Officer for the Bureau of Public Roads (App. 176a); its

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[47] Those same services are now enumerated in section 205(c) of the new Uniform Relocation Assistance Act of 1970 (Pet. Supp. Br. App. 5), and are required, under section 210 of the Act (see n. 43, *supra*), to be a part of a state's relocation assistance program before that state can obtain the Secretary's approval for any federal funding of a highway project.

progress with regard to relocations had been audited on a day-to-day basis (App. 211a), and some 125 replacement cases on these two projects had been carefully scrutinized by federal authorities (App. 210a). Mr. Saunders testified; "I don't believe we ever took exception to a single relocation" (App. 213a). On the basis of this experience, he concluded that the state could "relocate the people in the Triangle area and other areas" without difficulty (App. 176a). His superior, the Division Engineer for the West Virginia Division, agreed (App. 415a, 423a–424a). And see pp. 17–18, *supra*. That determination was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. (Supp. V) 706(2)(A)). See *Citizens to Preserve Overton Park* v. *Volpe*, No. 1066, this Term, decided March 2, 1971.[48]

Petitioners claim, however, that state and federal officials failed to make a proper assessment of the public and private housing market in Charleston. They rely

[48] Petitioners suggest that the court erred in relying largely on testimony of federal and state highway officials, rather than on an administrative record, in deciding that there was a rational basis for the federal determination that the state was here providing an adequate relocation assistance program. But the court was not reviewing a determination by the Secretary under 23 U.S.C. (Supp. V) 502; it specifically found that provision inapplicable. Rather, it was reviewing agency action under the earlier 1962 Act, which contained no specific requirements for the submission of written "assurances" and required no administrative record. In such circumstances, where no administrative record is available, the district court may hear testimony from officials involved in the challenged action. See *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, slip op. 17; *Shaughnessy* v. *Accardi*, 349 U.S. 280; compare *United States* v. *Morgan*, 313 U.S. 409, 422.

primarily on the testimony of a city planner from New York City, Mr. Abeles, and the study he prepared from 1960 census figures (see pp. 13–14, *supra*). On the basis of a 2.7-percent effective vacancy rate (*supra*, n. 16) in the private housing market of Charleston in 1960 (App. 299a), and an estimated net decrease of 400 dwelling units between 1960 and 1966 (App. 300a), Mr. Abeles testified (App. 308a): "My opinion as far as what has happened in the past and with reason to project in the future, including building this highway and other projects, the total net effect will be very deleterious to people who will be affected by such public action." Particularly disturbing to him was the prospect of having the proposed Charleston Urban Renewal Program (App. 100a) commence before those to be displaced by the highway could be relocated (App. 323a–324a).

While a memorandum written in early 1968 (App. 425a–426a), suggesting (largely on the basis of anticipated urban renewal programs) an impending shortage of private relocation housing in Charleston, tended to support Mr. Abeles' prognosis, thereafter the relocation situation in the private market improved. The explanation was threefold: first, the availability of rental supplements under the 1968 amendments (App. 427a);[*] second, a delay in anticipated urban renewal

[*] Section 506 of the Act provides for a two-year payment of up to $1500.00 as a rental supplement. 23 U.S.C. (Supp. V) 506(b). Under this provision, each displaced tenant is entitled to the difference between the rent he was paying and the average cost of renting a place adequate for the size of his family meeting the decent, safe and sanitary standards (App. 371a). At the time of trial, the 166 tenants in the Triangle area were paying

programs;[50] and third, recent plant closings in the area causing "additional vacancies generally in the rental area" (App. 363a). A study undertaken by the State Road Commission in February 1969 (App. 99a–126a) indicated that about 80 dwelling units, with an average monthly rental of $90.00, were available in the private section of the housing market "on any given day" (App. 101a, 112a).[51] In addition, the study found that public housing alone in Charleston

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"an average rent between $45.00 and $50.00 a month" (App. 101a). "The average rent of available units on the private market [was] approximately $90.00 per month" as of February 1969. While, as petitioners suggest (Pet. Br. 49–50 n. 115), there are potential problems created for those who receive the rental supplement at the end of the two-year statutory period, that is a matter for Congress and not the courts. Under the Uniform Relocation Assistance Act of 1970, Congress has extended the two-year period to four years. Section 204; Pet. Supp. Br. App. 4.

[50] In February 1969, state highway officials concluded: "Based on past experience relocation for the highway will be completed or substantially completed prior to any significant displacement for the Urban Renewal project" (App. 100a). As earlier indicated (*supra* n. 23), that forecast has since been proven accurate. The urban renewal project will have a far greater impact on the Triangle area than the highway: it will displace about 1500 persons as compared to the 326 displaced by the highway (App. 100a).

[51] Mr. Colan, Director of the State Right of Way Division, explained how these units were selected (App. 396a): "We have a staff of ten people assigned full time to these two projects. In addition we make available regularly members of our staff to check housing. On one particular day we let twenty men spend the whole day and the next day examining housing that was available in the Charleston market." The "private room situation," not covered by the city open housing ordinance, was "eliminated" from the study (App. 392a).

had a sufficient turnover to supply replacement housing to all Triangle displacees (App. 102a, 105a–108a).

It is undisputed that this housing was "decent, safe, and sanitary" was available at a monthly rent of twenty percent of net family income (App. 254a), and was let on a non-discriminatory basis (App. 253a). Moreover, for Triangle displacees, who as a practical matter had a first priority on the vacant units (*supra*, pp. 15–16), the waiting period was only thirty to sixty days (App. 253a). Of course, as petitioners point out (Pet. Br. 16), this housing also was available to other qualifying persons[22] within the two highway projects who lived outside the Triangle area. However, at the time the February 1969 study was prepared, there were apparently "so few left to be relocated in that class that they [were] rather insignificant in the overall relocation" (App. 387a).

On this evidence, there was ample basis for the district court's conclusion that a sufficient number of units of decent, safe and sanitary replacement housing would "be available in the Charleston area for an orderly relocation of the displacees from the interstate highway" (App. 57a). Nothing that has happened since suggests otherwise. Indeed, it seems somewhat quixotic to be discussing the accuracy of projections on the likelihood of available replacement

[22] Families qualifying for public housing in Charleston had an average annual income of less than $5,000.00 (App. 426a). In the Triangle area, the average income was about $170.00 per month (App. 260a, 333a), or $2,040.00 per year.

housing for future relocations at a time after virtually all those relocations have taken place.

In their request for relief (Pet. Br. 50–52), petitioners appear to suggest that this Court should now order respondents to prepare a formal plan of relocation applying equally to those persons already displaced from the Triangle area and those few who still remain and to provide adequate housing for any displacees whose new housing is inadequate. Such relief, however, necessarily would require this Court to conclude both that such a plan was required by law and that, as a matter of fact, without it the state could not have provided adequate relocation housing in Charleston. For the reasons set forth above, we think it clear that there existed no legal requirement for a formal plan. The factual question was fully litigated at trial and decided against petitioners, and the court of appeals necessarily approved that finding when it affirmed on the opinion of the district court. There is therefore neither legal nor factual basis for a formal relocation plan in this case.[52] If there are any persons

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[52] Petitioners suggest that the federal respondents be required under the Federal-Aid Highway Act of 1970 (Pub. L. 91-605, 23 U.S.C. 510) to authorize "the construction, rehabilitation or purchase of housing for dislocatees" from the two subject projects (Pet. Br. 52). However, that statute provides for such authorization "where a proposed project * * * cannot proceed to actual construction because replacement housing is not available and cannot otherwise be made available * * *." Here, the evidence shows ample availability of replacement housing in the Charleston area. Even assuming *arguendo* that some persons have been relocated into substandard housing, a point we dispute, that in itself does not necessarily indicate any shortage of adequate replacement housing in the area.

displaced from these highway projects, either within or without the Triangle area, who have been relocated into substandard housing, they can appropriately seek legal redress in separate proceedings.

CONCLUSION

For the reasons stated, the writ of certiorari should be dismissed or the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1968 HIGHWAY RELOCATION AMENDMENTS

(23 U.S.C. § 501 *et seq.*)

(Pub. L. 90–495, § 30, Aug. 23, 1968, 82 Stat. 830)

§ 501. Declaration of policy

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

§ 502. Assurances of adequate relocation assistance program

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

§ 503. Administration of relocation assistance program

In order to prevent unnecessary expenses and duplication of functions, a State highway department may make relocation payments or provide relocation assistance or otherwise carry out the functions required under this chapter by utilizing the facilities, personnel, and services of any other Federal, State, or local governmental agency having an established organization for conducting relocation assistance programs.

§ 504. Federal reimbursement

(a) The Secretary shall approve, as a part of the cost of construction of a project under any Federal-aid highway program which he administers, the cost of providing the payments and services described in section 502, except that notwithstanding any other law, the Federal share of the first $25,000 of such payments to any person, on account of any real property acquisition or displacement occurring prior to July 1, 1970, shall be increased to 100 per centum of such cost.

(b) Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property.

§ 505. Relocation payments

(a) Payments for actual expenses.—Upon application approved by the State agency, a person displaced by any highway project approved under section 106 or section 117 of this title may elect to receive actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property.

(b) Optional payments—dwellings.—Any displaced person who moves from a dwelling who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive—

(1) a moving expense allowance, determined according to a schedule established by the Secretary, not to exceed $200; and

(2) a dislocation allowance of $100.

(c) Optional payments—businesses and farm operations.—Any displaced person who moves or discontinues his business or farm operation who elects to accept the payment authorized by this section in lieu of the payment authorized by subsection (a) of this section, may receive a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, or $5,000, whichever is the lesser. In the case of a business, no payment shall be made under this subsection unless the State

agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not part of a commercial enterprise having at least one other establishment, not being acquired by the State or by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation, before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two-year period.

§ 506. Replacement housing

(a) In addition to amounts otherwise authorized by this title, the State agency shall make a payment to the owner of real property acquired for a project which is improved by a single-, two-, or three-family dwelling actually owned and occupied by the owner for not less than one year prior to the initiation of negotiations for the acquisition of such property. Such payment, not to exceed $5,000, shall be the amount, if any, which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the Secretary, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of employment and available on the private market. Such payment shall be made only to a dis-

placed owner who purchases and occupies a dwelling within one year subsequent to the date on which he is required to move from the dwelling acquired for the project. No such payment shall be required or included as a project cost under section 504 of this title if the owner-occupant receives a payment required by the State law of eminent domain which is determined by the Secretary to have substantially the same purpose and effect as this section and to be part of the cost of the project for which Federal financial assistance is available.

(b) In addition to amounts otherwise authorized by this title, the State agency shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under subsection (a) of this section which dwelling was actually and lawfully occupied by such individual or family for not less than 90 days prior to the initiation of negotiations for acquisition of such property. Such payment, not to exceed $1,500, shall be the amount which is necessary to enable such person to lease or rent for a period not to exceed 2 years, or to make the down payment on the purchase of, a decent, safe, and sanitary dwelling of standards adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.

§ 507. Expenses incidental to transfer of property.

(a) In addition to amounts otherwise authorized by this title, the State shall reimburse the owner of real property acquired for a project for reasonable and necessary expenses incurred for (1) recording fees, transfer taxes, and similar expenses incidental to conveying such property; (2) penalty costs for prepayment of any mortgage entered into in good faith en-

cumbering such real property if such mortgage is on record or has been filed for record under applicable State law on the date of final approval by the State of the location of such project; and (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting of title in the State, or the effective date of the possession of such real property by the State, whichever is earlier.

(b) No payment received under this chapter shall be considered as income for the purposes of the Internal Revenue Code of 1954, or for the purpose of determining the eligibility or the extent of eligibility of any person for assistance under the Social Security Act or any other Federal law.

§ 508. Relocation services

(a) Each State shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order—

(1) to determine the needs, if any, of displaced families, individuals, business concerns, and farm operators for relocation assistance;

(2) to assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, housing meeting the standards established by the Secretary for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

(3) to assist owners of displaced businesses and displaced farm operators in obtaining and

becoming established in suitable locations; and

(4) to supply information concerning the Federal Housing Administration home acquisition program under section 221(d)(2) of the National Housing Act, the small business disaster loan program under section 7(b)(3) of the Small Business Act, and other State or Federal programs offering assistance to displaced persons.

(b) Nothing in this chapter shall be construed to prohibit any person from exercising any right or remedy available to him under State law with respect to any action of a State agency in carrying out this chapter.

§ 509. Relocation assistance programs on Federal highway projects

Notwithstanding any other provision of law, on and after the effective date of this title any Federal agency which acquires real property for use in connection with a highway project authorized by section 107 and chapter 2 of this title or any other Federal law shall, in accordance with regulations issued by the Secretary, provide the payments and services described in sections 502, 505, 506, 507, and 508 of this title. When real property is acquired by a State or local governmental agency for such a Federal project for purposes of this chapter, the acquisition shall be deemed an acquisition by the Federal agency having authority over such project.

§ 510. Authority of the Secretary

(a) To carry into effect the provisions of this chapter, the Secretary is authorized to make such rules and regulations as he may determine to be necessary to assure—

(1) that the payments authorized by this chapter shall be fair and reasonable and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the State agency making such determination.

(b) The Secretary may make such other rules and regulations consistent with the provisions of this chapter as he deems necessary or appropriate to carry out this chapter.

§ 311. Definitions

As used in this chapter—

(1) The term "person" means—

(A) any individual, partnership, corporation, or association which is the owner of a business;

(B) any owner, part owner, tenant, or sharecropper who operates a farm;

(C) an individual who is the head of a family; or

(D) an individual not a member of a family.

(2) The term "family" means two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption, or legal guardianship.

(3) The term "displaced person" means any person who moves from real property on or after the effective date of this chapter as a result of the acquisition or reasonable expectation of acquisition of such real property, which

is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway of other real property on which such person conducts a business or farm operation.

(4) The term "business" means any lawful activity conducted primarily—

(A) for the purchase and resale, manufacture, processing, or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public; or

(C) by a nonprofit organization.

(5) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(6) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government and any corporation wholly owned by the Government.

(7) The term "State agency" means a State highway department or any agency designated by a State highway department to administer the relocation assistance program authorized by this chapter.

Section 37 of Pub. L. 90–495 provided that:

This Act and the amendments made by this Act shall take effect on the date of its enactment except that until July 1, 1970, sections 502, 505, 506, 507, and 508 of title 23, United States Code as added by this Act, shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. After July 1, 1970, such sections shall

be completely applicable to all States. Section 133 of title 23, United States Code, shall not apply to any State if sections 502, 505, 506, 507, and 508 of title 23, United States Code, are applicable in that State, and effective July 1, 1970, such section 133 is repealed.

FEDERAL-AID HIGHWAY ACT OF 1970

(Pub. L. 91-605, Dec. 31, 1970)

CONSTRUCTION OF REPLACEMENT HOUSING

SEC. 117. (a) Sections 510 and 511 of title 23, United States Code including all references thereto are hereby renumbered as sections 511 and 512 respectively.

(b) Chapter 5 of title 23, United States Code, is amended by inserting immediately after section 509 the following new section:

"§ 510. Construction of replacement housing

"(a) The Secretary may approve as a part of the cost of construction of any project on any Federal-aid system the cost of (A) constructing new housing, (B) acquiring existing housing, (C) rehabilitating existing housing, and (D) relocating existing housing, as replacement housing for individuals and families where a proposed project on the Federal-aid system cannot proceed to actual construction because replacement housing is not available and cannot otherwise be made available as required by section 502 of this title. For the purposes of this subsection the term 'housing' includes all appurtenances thereto.

"(b) State highway departments shall, wherever practicable, utilize the services of State or local governmental housing agencies in carrying out this section."

(c) The analysis of chapter 5 of title 28, United States Code, is amended by adding after

"509. Relocation assistance programs on Federal highway projects."

the following:

"510. Construction of replacement housing."

(d) The definition of the term "construction" in section 101(a) of title 23, United States Code, is amended to read as follows:

"The term 'construction' means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in the Department of commerce), acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, and acquisition, and rehabilitation, relocation, and construction of replacement housing."

EFFECTIVE DATE OF RELOCATION PROVISIONS

SEC. 120. Section 37 of the Federal-Aid Highway Act of 1968 is amended to read as follows:

"EFFECTIVE DATE

"SEC. 37. (a) Except as otherwise provided in subsection (b) of this section, this Act and the amendments made by this Act shall take effect on the date of its enactment, except that until July 1, 1970, sections 502, 505, 506, 507,

and 508 of title 23, United States Code, as added by this Act, shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. Except as otherwise provided in subsection (b) of this section, after July 1, 1970, such sections shall be completely applicable to all States. Section 133 of title 23, United States Code, shall not apply to any State if sections 502, 505, 506, 507, and 508 of title 23, United States Code, are applicable in that State, and effective July 1, 1970, such section 133 is repealed, except as otherwise provided in subsection (b) of this section.

"(b) In the case of any State (1) which is required to amend its constitution to comply with sections 502, 505, 506, 507, and 508 of title 23, United States Code, and (2) which cannot submit the required constitutional amendment for ratification prior to July 1, 1970, the date of July 1, 1970, contained in subsection (a) of this section shall be extended to July 1, 1972."

APPENDIX B

PROCEDURE & POLICY DIRECTIVES

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

SEPTEMBER 5, 1968.

INSTRUCTIONAL MEMORANDUM 80-1-68
34-10

SUBJECT: Relocation Assistance and Payments—Interim Operating Procedures (RCS 34-01-03)
(B/B 04-R-2211)

There are enclosed Interim Operating Procedures covering the administration of the Highway Relocation Assistance Program established by Chapter 5 of Title 23, U.S.C.

These procedures supersede paragraph 3 of PPM 80-5 and will be incorporated in a new Policy and Procedure Memorandum after a period of operation thereunder.

/s/ F. C. TURNER,
F. C. Turner,
Director of Public Roads.

/s/ LOWELL K. BRIDWELL,
Lowell K. Bridwell,
Federal Highway Administrator.

[Including Amendments of Paragraphs 5a(2), 5a(5), 7b(2) and 9c(2) dated October 2, 1968 and November 5, 1968]

Interim Operating Procedures

Relocation Assistance and Payments

1. PURPOSE

In accordance with Chapter 5 of Title 23, U.S.C., this memorandum prescribes policies and procedures relating to the following:

a. Administration of the relocation program and the provision of relocation payments and services to individuals, families, businesses, and farm operators displaced by Federal-aid highway construction;

b. Eligibility for reimbursement of relocation payments and costs of services by State and State designated agencies; and

c. Relocation payment records and relocation advisory assistance reports.

2. EFFECTIVE DATE AND APPLICABILITY

a. The provisions of this memorandum are effective August 23, 1968, and the payments and services described herein shall be provided by the State to the extent that such State is able to comply herewith under its laws. After July 1, 1970, such payments and services shall be provided by all States.

b. The provisions of this memorandum are applicable to the following:

(1) All Federal-aid highway projects authorized after August 23, 1968, involving rights-of-way which are occupied by an individual, family, business, farm operator, or nonprofit organization.

(2) All Federal-aid highway projects authorized on or before August 23, 1968, on which individuals, families, businesses, farm operations, and nonprofit organizations have not been displaced.

(3) Rights-of-way acquired without Federal participation upon which the State intends to construct a Federal-aid project from which as of August 23, 1968, individuals, families, business, farm operations, and nonprofit organizations have not been displaced.

c. The relocation payments and services described in this memorandum shall be provided by any Federal agency which acquires property for highway projects authorized under Chapters 1 and 2 of Title 23, U.S.C. When real property is acquired by a State or local governmental agency for such a Federal project, the acquisition shall be deemed to be an acquisition by the Federal agency having authority over such project.

3. AUTHORITY

Statutory authorty for this memorandum is set forth in Chapter 5 of Title 23, U.S.C. (23 U.S.C. 501 *et seq.*).

4. PROGRAMMING

* * *

b. Any ~~project~~ agreement with a State which was executed on or before August 23, 1968, and which requires the use of property not acquired as of that date shall be amended to include the cost of providing the payments and services described in this memorandum. Any number of projects may be amended in a single action with each project identified. Form PR–37, Project Status Record, must be prepared for each project as required by Volume 22, Chapter V, Administrative Manual. Attach a copy of the modified agreement to each PR–37.

5. ASSURANCES OF ADEQUATE RELOCATION ASSISTANCE PROGRAM.

a. No State highway department shall be authorized to proceed with any phase of any project which will

cause the displacement of any person or any construction project concerning any right-of-way acquired by the State without Federal participation and coming within the provisions of paragraph 2b(3) above, until it has furnished satisfactory assurances to the extent State law permits, that:

(1) Relocation payments and services were or will be provided as set forth in paragraphs 6–10 of this memorandum.

(2) In the event housing available to persons without regard to race, color, religion or national origin will not be available within a reasonable period of time prior to displacement as provided in paragraph 7 of this memorandum, the State shall provide a detailed statement specifying the respects in which such assurance cannot be furnished, the extent to which such housing will be available prior to displacement, the period of time prior to displacement when that housing will become available and an estimate of the additional time within which such housing will become available to the extent that it can be reasonably accomplished.

(3) The public was or will be adequately informed of the relocation payments and services which will be available, as set forth in paragraph 12 of this memorandum.

(4) No person lawfully occupying the real property shall be required to move from his home, farm or business location without at least 90 days written notice of the intended vacation date from the State or political subdivision having responsibility for such acquisition. This provision must be carried out to the maximum extent practicable and exceptions should be made only in the case of very unusual conditions. Such assurance can be furnished on a Statewide

basis or set forth in Point 31 of the State's statement of organization and procedures.

(5) The State's relocation program is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing available to persons without regard to race, color, religion or national origin with minimum hardship on those affected.

b. The above assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum. The state will pick up the sequence at whatever point it may be in the acquisition program at the time of issuance of this memorandum.

c. The State's assurances shall be accompanied by a statement in which it specifies the provisions of this memorandum with which it is unable under its laws to comply in whole or in part. In the event a State maintains that it is legally unable to comply fully with one or more of the provisions of this memorandum, its statement shall be supported by an opinion of the chief legal officer of the highway department in which he discusses the legal issues raised and cites reasons and authorities in support of his conclusion for each representation of legal inability to comply.

6. Administration of the Relocation Assistance Program

a. In order to prevent unnecessary expenses and duplication of functions, the State highway department may make relocation payments or provide relocation assistance or otherwise carry out the functions described in this memorandum by utilizing the facilities, personnel, and services of any other Federal, State, or local governmental agency having an

established organization for conducting relocation assistance programs.

b. Where a State highway department elects to have the relocation payments and services required under this PPM administered by another Federal, State, or local agency, it shall enter into a written contract or agreement to that effect with the agency it selects. Such contract or agreement shall be subject to the approval of the division engineer and shall obligate the agency to perform the services and make the payments in accordance with Chapter 5 of Title 23, U.S.C., and the regulations and procedures of the Bureau of Public Roads. The contract shall also provide that the records required by paragraph 15 of this memorandum will be retained by the agency administering the relocation program for a period of not less than three years after payment of the final voucher with respect to the particular project, or that these records will be turned over to the State highway department. In the event these records are turned over to the highway department, that department will retain them for a like period. These records shall be made available for inspection by representatives of the Federal Government of any reasonable hour. Where the contract is with a public agency administering another Federal grant program, the contract shall specify the financial responsibilities of each to finance the relocation program required by this memorandum.

c. The State highway department shall, under Point 31 of its policy and procedural statement, identify the office in the State highway department which has Statewide responsibility for implementing the relocation program, the director of that office, and the State agency which will administer the relocation program.

It shall also include the estimated number and job titles of personnel in the State highway department and the State agency who have direct responsibility for providing relocating payments and services.

d. The organization and procedures of the State agency which administers the relocation program shall provide as a minimum that:

(1) Each right-of-way project shall have assigned to it one or more individuals whose primary responsibility is to provide relocation assistance. These individuals may have responsibility for more than one project where reasonable.

(2) A local subsidiary office will be established which is reasonably convenient to public transportation or within walking distance of each project when the division engineer determines, after consultation with the State, that the volume of work or the needs of the displaced persons are such as to justify the establishment of such an office. These offices shall be open during hours convenient to the persons to be displaced, including at least one and preferably more evenings per week if necessary.

(3) Regardless of whether a local office is established, personal contact will be made with each person as defined in paragraph 17, to be displaced to explain the relocation payments and assistance which are available and to assist in completing any applications required. If such contact cannot be made, the State agency shall furnish documentation to show that reasonable efforts have been made to achieve this contact.

(4) Relocation officials shall maintain personal contact with and shall exchange information with other agencies rendering services useful to displaced persons. Such agencies include social welfare agencies, urban renewal agencies, redevelopment authorities,

public housing authorities, the Federal Housing Administration, Veterans Administration and Small Business Administration. Personal contact shall also be maintained with local sources of information on private replacement properties, including real estate brokers, real estate boards, property managers, apartment owners and operators, and home building contractors. Subscriptions may be maintained for multiple listing services, apartment directory services, neighborhood and metropolitan newspapers, etc.

(5) The local relocation office shall maintain and provide:

(a) lists of replacement dwellings available to persons without regard to race, color, religion or national origin drawn from various sources, suitable in price, size and condition for displaced persons to the extent they are available;

(b) current data for such costs as security deposits for utilities, damages, and leases, closing costs, typical downpayments, and interest rates and terms;

(c) maps showing the location of schools, parks, playgrounds, shopping and public transportation routes in the area, and

(d) schedules and costs of public transportation.

(6) Other recommended information to be provided by relocation offices includes copies of the State's brochure explaining its relocation program, local ordinances pertaining to housing, building codes, and open housing; FHA and VA booklets of information on inspecting and evaluating replacement housing; and consumer education literature on housing, shelter costs and family budgeting.

7. Development of Relocation Program Plan

The planning for the relocation program shall be accomplished in stages:

a. Conceptual Stage. A project will be considered to be in this stage until such time as the final location is approved. At this stage the tenant is not to be disturbed in any way. The cost incurred in connection with securing this information is chargeable to preliminary engineering. Prior to the completion of this stage and prior to the public hearing, the State shall make preliminary investigations which will furnish the following information for each of the various alternative locations given final consideration.

(1) Approximate number of individuals, families, businesses, farms, and nonprofit organizations that would be displaced.

(2) The probable availability of decent, safe, and sanitary replacement housing within the financial means of those displaced.

(3) The basis upon which the above findings were made and a statement relative thereto by the State to the Bureau of Public Roads.

b. Right-of-Way Acquisition and/or Construction Stage.

The State highway department, prior to proceeding with right-of-way negotiations and/or construction shall furnish the following information for review and approval by the division engineer:

(1) The method and procedures by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing at reasonable rents or prices and readily accessible to his place of employment.

(2) The method and procedure by which the State will assure an inventory of currently available comparable housing available to persons without regard to race, color, religion or national origin which is decent, safe, and sanitary, including type of building,

state of repair, number of rooms, needs of the person or family being displaced (based on standards outlined in paragraph 13a), type of neighborhood, proximity of public transportation and commercial shopping areas, and distance to any pertinent social institutions, such as church, community facilities, etc. The use of maps, plats, charts, etc., would be useful at this stage.

(3) An analysis relating to the characteristics of the inventories so as to develop a relocation plan which will:

(a) outline the various relocation problems disclosed by the above survey;

(b) provide an analysis of Federal, State and community programs affecting the availability of housing currently in operation in the project area;

(c) provide detailed information on concurrent displacement and relocation by other governmental agencies or private concerns;

(d) provide an analysis of the problems involved and the method of operation to resolve and relocate the relocatees;

(e) estimate the amount of leadtime required and demonstrate its adequency to carry out a timely, orderly and humane relocation program;

(f) assure no person lawfully occupying real property shall be required to move without at least 90 days written notice; and

(g) furnish the names of the agency or agencies, if other than the State, which will provide the relocation assistance including an analysis of their present workload and ability to perform and the estimated number and job titles of relocation personnel servicing the project.

9. REPLACEMENT HOUSING

a. General Provisions

In addition to other payments authorized by this memorandum, individuals and families displaced from dwellings on real property acquired for a Federal-aid project are entitled to supplementary payments in accordance with this paragraph. The State highway department or the agency administering the relocation program shall develop procedures to implement this paragraph, which shall be submitted to the division engineer for his approval. Such procedures shall be designed to assure that the availability of these payments is brought to the attention of all eligible persons as provided in paragraphs 6 and 12 of this memorandum.

* * * * *

c. Payment to owner-occupants displaced from dwellings who do not qualify for payments under 9(b) and individuals or families who are occupying rental or leased space.

In addition to the moving cost payments to which they are entitled under the provisions of paragraph 8c of this memorandum, owner-occupants who do not qualify for payment under paragraph 9b and tenants who are displaced by a highway project are entitled to the following payments if they have lawfully occupied the dwelling taken for at least 90 days prior to the initiation of negotiations for such property.

(1) An individual or family renting a dwelling unit taken for a project is entitled to a payment to enable him to rent or purchase decent, safe, and sanitary housing. The amount of the payment shall be determined by subtracting 24 times the amount which the displaced individual or family paid in rent for the

last month immediately before being required to move, or 24 times the economic rent as established by the State's appraisal process for his dwelling unit, whichever is the lesser, from the amount necessary to rent a decent, safe, and sanitary dwelling for the next two years, but in no event shall this amount exceed $1,500. Where rent is being paid to a State or political subdivision thereof economic rent shall be used in determining the amount of payment to which the relocatee is entitled.

(2) An owner-occupant who is not eligible for payment because he had not actually owned and occupied his dwelling for at least one year prior to the initiation of the negotiation for the acquisition of that property by the State or has elected not to purchase a new property shall be entitled to the following payment: A sum equal to the difference, if any, between the cost of renting for the next two years a decent, safe, and sanitary dwelling adequate to accommodate him and his family in an area not generally less desirable in regard to public utilities and commercial facilities than the area from which he was displaced and 12 percent of the acquisition price of the property taken, but in no event may this payment exceed $1,500 or the amount which the owner-occupant would have received had he been eligible for a payment under paragraph 9b, whichever is the lesser. This may be used as a rent supplement or for a downpayment on the purchase of a dwelling.

* * * * *

g. Hardship cases

In cases of extreme hardship or other similar extenuating circumstances, exceptions to the decent, safe, and sanitary characteristics of replacement housing may be permitted in particular cases and the displaced individual or family still qualify for

a payment under this paragraph. Such exceptions will only be made with the written concurrence of the Regional Federal Highway Administrator.

11. APPEALS

a. An applicant for a payment under paragraphs 8, 9, or 10 of this memorandum shall be notified promptly in writing concerning his eligibility for the payment claimed; the amount, if any, he is entitled to receive; and the time and manner in which such payment will be made. Such notification shall also inform the applicant of his right to appeal and the procedures therefor, in the event the applicant is dissatisfied with the initial ruling on his application for such payments.

b. The head of the State agency shall establish procedures, consistent with the applicable State law, for reviewing appeals under this memorandum. Those procedures shall provide, at the minimum, that any person taking such an appeal shall be given (1) full opportunity to be heard and (2) a prompt decision giving reasons in support of the result reached.

c. The State highway department shall submit to the division engineer under Point 31 of its policy and procedural statement the procedure which has been established for review of determinations under paragraphs 8, 9, and 10 of this memorandum.

12. PUBLIC INFORMATION

In order to assure that the public has adequate knowledge of the relocation program, the State highway department shall include with requests for authorizations to proceed on projects causing displacement a statement that it has or will take the following steps:

a. The relocation program described in paragraphs 6 through 11 of this memorandum has been discussed at all public hearings required by 23 U.S. Code 128 and the PPM's implementing that section. The State shall prepare a brochure describing its relocation program and distribute the same without cost at all public hearings and to all other individuals and organizations as appropriate. The brochure shall state where copies of any State regulations implementing the relocation assistance program can be obtained.

b. The State agency shall provide full and adequate public notice of the relocation payments to be made and services to be rendered. Such public notice shall include the utilization of local newspapers, radio, and television stations (with particular emphasis on those which are read or listened to by the residents on the project) and local meetings for dissemination of news releases, advertisements, announcements and the like.

c. The State agency shall prepare and furnish each individual, family, business, and farm operator to be displaced by the project a written description of the (1) location assistance payments and services available; (2) the eligibility requirements and procedures for obtaining these payments and services; and (3) the right to appeal and procedure for appealing to the head of the State agency or the official designated to act for him. The above information shall be furnished by means of personal contact with those to be displaced unless an alternative method is approved by the division engineer. This information shall be furnished simultaneously with the initiation of negotiations for the property involved, and to tenants not later than 15 days after a contract for the purchase of property involved has been entered into. In no event shall such notice be less than 90 days prior to

the date the tenant will be required to move. The individual furnishing this information shall document the file to that effect.

13. STANDARDS FOR DECENT, SAFE AND SANITARY HOUSING

a. A decent, safe, and sanitary dwelling is one which meets all of the following minimum requirements:

(1) Conforms with all applicable provisions for existing structures that have been established under State or local building, plumbing, electrical, housing and occupancy codes and similiar ordinances or regulations applicable to the property in question.

(2) Has a continuing and adequate supply of potable safe water.

(3) Has a kitchen or an area set aside for kitchen use which contains a sink in good working condition and connected to hot and cold water, and a sewage disposal system. A stove and refrigerator in good operating condition shall be provided when required by local codes, ordinances or custom. When these facilities are not so required by local codes, ordinances, or custom the kitchen area or area set aside for such use shall have utility service connections and adequate space for the installation of such facilities.

(4) Has an adequate heating system in good working order which will maintain a minimum temperature of 70 degrees in the living area under local outdoor design temperature conditions. A heating system will not be required in those geographical areas where such is not normally included in new housing.

(5) Has a bathroom, well lighted and ventilated and affording privacy to a person within it, containing a lavatory basin and a bathtub or stall shower, properly connected to an adequate supply of

hot and cold running water, and a flush water closet, all in good working order and properly connected to a sewage disposal system.

(6) Has provision for artificial lighting for each room.

(7) Is structurally sound, in good repair and adequately maintained.

(8) Each building used for dwelling purposes shall have two safe unobstructed means of egress leading to safe open space at ground level. Each dwelling unit in a multi-dwelling building must have access either directly or through a common corridor to two means of egress to open space at ground level. In buildings of three stories or more, the common corridor on each story must have at least two means of egress.

(9) Has 150 square feet of habitable floor space for the first occupant in a standard living unit and at least 100 square feet of habitable floor space for each additional occupant. The floor space is to be subdivided into sufficient rooms to be adequate for the family. All rooms must be adequately ventilated. Habitable floor space is defined as that space used for sleeping, living, cooking or dining purposes, and excludes such enclosed places as closets, pantries, bath or toilet rooms, service rooms, connecting corridors, laundries, and unfinished attics, foyers, storage spaces, cellars, utility rooms and similar spaces.

b. Rental of sleeping rooms. The standards for decent, safe, and sanitary housing as applied to the rental of sleeping rooms shall include the minimum requirements contained in subparagraphs a(1), (4), (6), (7) and (8) of this paragraph and the following:

(1) At least 100 square feet of habitable floor space for the first occupant and 50 square feet of habitable floor space for each additional occupant.

(2). Lavatory and toilet facilities that provide privacy including a door that can be locked if such facilities are separate from the room.

(e) In lieu of the standards listed in this paragraph the agency providing the relocation assistance described in the PPM may submit for approval by the Director of Public Roads a local housing code by means of which the decent, safe, and sanitary nature of replacement housing for a project is to be judged. Any code so submitted shall be reasonably comparable to the list of standards incorporated in this paragraph.

d. The Director of Public Roads may approve exceptions to the standards in this paragraph where unusual conditions exist.

17. DEFINITIONS

As used in this PPM

c. Displaced Person

The term "displaced person" means any person who moves from real property on or after the effective date of this memorandum as a result of the acquisition or reasonable expectation of acquisition of such real property which is subsequently acquired, in whole or in part, for a Federal-aid highway, or as the result of the acquisition for a Federal-aid highway or other real property on which such person conducts a business or farm operation. A person who moves from real property which is subsequently acquired for a Federal-aid highway as a result of the "reasonable expectation of acquisition of such real property" is one who moves from such property (1) after notification by the State highway department that the property is to be acquired for a project, or after the location of the highway has been definitely established

and approved by the Bureau of Public Roads and (2) within 12 months before the property is scheduled to be taken by the State;

* * * * *

f. *Federal Agency*

The term "Federal agency" means any department, agency or instrumentality in the executive branch of the government and any corporation wholly owned by the government.

g. *State Agency*.

The term "State agency" means a State highway department or any agency designated by a State highway department to administer the relocation assistance program authorized by Chapter 5, Title 23, U.S.C.

h. *Displacement*

The vacating by the eligible person of real property after the happening of any one of the following events shall be deemed to be a displacement as a result of the acquisition or clearance of right-of-way for or construction of a Federal-aid highway project:

(1) The State highway department or political subdivision becomes entitled to possession of the real property pursuant to an agreement or a court order in a condemnation proceeding instituted for the purpose of acquiring title.

(2) Title to the real property is conveyed to the State highway department or political subdivision by the owner thereof.

(3) A binding contract for the purchase of the real property is entered into by the State highway department or political subdivision and the owner of such real property, if the real property is not occupied by another eligible person prior to acquisition of title or right of possession.

(4) Public Roads authorizes the State to proceed with the relocation prior to actual acquisition of title or possession of the real property by the State highway department, or political subdivision.

(5) Any other move from real property subsequently acquired for a Federal-aid highway, which takes place as a result of the reasonable expectation that the property will be acquired for the highway, shall be deemed a displacement caused by the highway project for purposes of this PPM.

* * * * *

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

DECEMBER 26, 1968.

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers.

FROM: J. A. Swanson, Director of Right-of-Way and 34-10 Location Washington, D.C. s/ John A. Swanson.

SUBJECT: Relocation Procedures.

A question has arisen as to whether it is necessary for a State to furnish all of the information required by paragraph 7b of IM 80-1-68 if the State's legal opinion and assurances indicate that the State cannot under present State law conform to the requirements of the 1968 Act relative to making replacement housing payments to enable displaced persons to move into decent, safe and sanitary housing.

Under such circumstances the State cannot reasonably be expected to furnish all of the information required by paragraph 7b. The State should, however, survey the available housing and have information relative thereto accessible to the relocatees in accordance with the requirements of paragraph 6d(5). Under paragraph 7b(3) the division engineer should insist that the State furnish an analysis of the reloca-

tion problems and possible solutions in sufficient detail to enable him to determine the advisability of proceeding with the project and to assure that no relocatee will be required to move unless there is satisfactory replacement housing available to him. The State should, of course, make every effort that it can under existing law to see that the displacee is relocated in decent, safe and sanitary housing.

When he is satisfied that conditions exist which will result in fair and equitable treatment of the relocatees the division engineer may authorize negotiations and/or construction even though the State cannot make the payments to place the relocatees in decent, safe and sanitary housing.

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

FEBRUARY 12, 1969.

CIRCULAR MEMORANDUM TO:
Regional Federal Highway
Administrators and Division
Engineers.

FROM: J. A. Swanson, Director of Right-of-Way and
34-10 Location Washington, D.C. s/ John A.
Swanson.

SUBJECT: Relocation Procedures—Going Projects.

Paragraphs 2 (b)(2) and (3) of IM 80-1-68 state that its provisions are applicable to all active Federal-aid projects and to all other active projects upon which the State later intends to construct a Federal-aid project where there remain individuals families, businesses, farm operations, and non-profit organizations which will be displaced.

In accomplishing the planning for the relocation program required under paragraph 7. the State should undertake such planning on all active projects to the extent that it is reasonable and proper. Each such project, undoubtedly will involve a different set of circumstances and conditions. It, therefore, will be necessary for the division engineer to carefully review the status of each project before issuing any addi-

tional authorizations to acquire right-of-way or to authorize construction on a project for which right of way was acquired after August 23, 1968, irrespective of the source of funds utilized for such acquisition, to assure himself that the State has or will make the necessary relocations without undue hardship to the relocatees. If a major portion of the relocations have previously been accomplished very little good would result from going through the conceptual stage study. However, if a substantial number of persons remain to be relocated at any time an authorization is requested which would require such relocation, it would seem that the division engineer would need to have the information required by paragraph 7b. Some variation may be permitted by the division engineer when the circumstances warrant.

It should always be borne in mind that regardless of the information furnished at this stage of the project it is the responsibility of the State to furnish relocation assistance, and payments where authorized by State law, in accordance with the requirements of the law and the Im. At no time should a relocatee be forced into housing less desirable than that from which he was required to move and to the extent possible under State law all relocations should be made to decent, safe and sanitary dwellings.

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Bureau of Public Roads
Washington, D.C. 20591

APRIL 10, 1970.

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators and Division Engineers.

FROM: John A. Swanson, Associate Director
34—10 for Right-of-Way and Location
Washington, D.C.

SUBJECT: Relocation Assistance—Availability of Replacement Housing (Supersedes White Circular Memorandum dated March 27, 1970).

This memorandum is applicable to the following:

a. All Federal-aid or any other highway projects financed in whole or in part with Federal-aid highway funds or other Federal funds authorized on or after May 1, 1970, involving rights-of-way which are occupied by an individual or family.

b. All Federal-aid or any other highway project financed in whole or in part with Federal-aid highway funds or other Federal funds authorized prior to May 1, 1970, on which individuals or families are still to be displaced as of May 1, 1970.

The division engineer shall not authorize any phase of construction (clearance of right-of-way regardless of how performed is considered to be a construction phase insofar as this memorandum is concerned) which would require the displacement of individuals or families, or permit the dislocation of individuals or families on any such project or on any project already authorized, until such time as the person being relocated has either by himself obtained and has the right of possession of adequate replacement housing or the State offers him adequate replacement housing which is available for immediate occupancy.

Such replacement housing shall be:

a. Fair housing—open to all persons regardless of race, color, religion, sex, or national origin.

b. In areas not generally less desirable in regard to:

1. Public utilities
2. Public and commercial facilities

c. Available at rents or prices within the financial means of the families and individuals displaced.

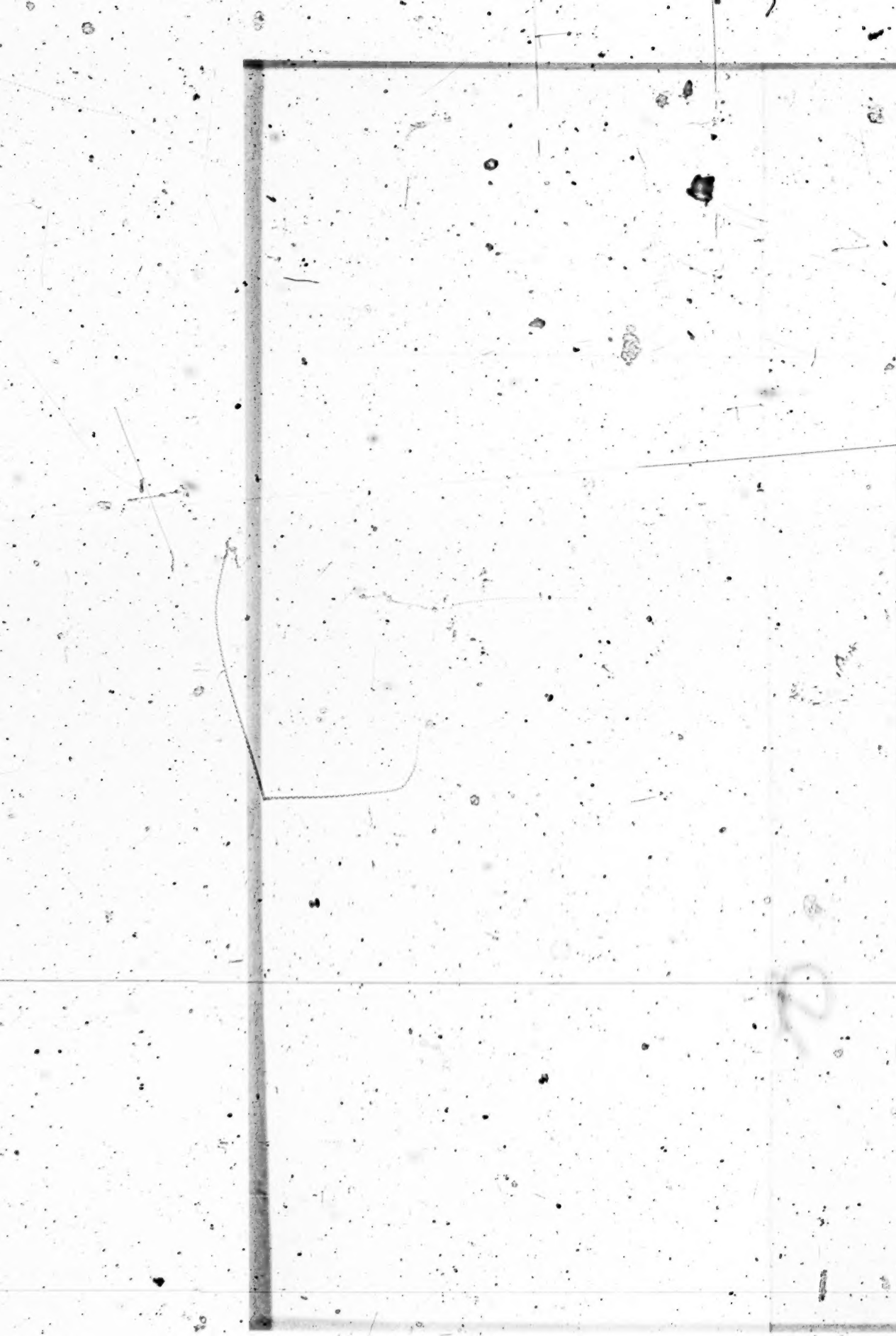
d. Decent, safe and sanitary.

e. Reasonably accessible to the displacees' places of employment.

f. Adequate to accommodate the displacee.

The applicable PPM's and IM's are being revised to conform to the above policy.

U.S. GOVERNMENT PRINTING OFFICE —1971



TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 712. Argued March 22, 1971—Decided May 17, 1971.

429 F. 2d 423, certiorari dismissed as improvidently granted.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III*, *Charles Stephen Ralston*, *Elizabeth B. DuBois*, and *Thomas J. O'Sullivan*.

William Bradford Reynolds argued the cause for the federal respondents *pro hac vice*. With him on the brief were *Solicitor General Griswold* and *Assistant Attorney General Gray*. *Stanley E. Preiser* argued the cause and filed a brief for the state respondents.

Kenneth F. Phillips filed a brief for the National Housing and Economic Development Law Project as *amicus curiae* urging reversal.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE HARLAN, concurring.

In light of my Brother DOUGLAS' assertion, *post*, at 508, that today's disposition might be taken to impair the integrity of the "rule of four," see *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 559–562, 564 (1957) (opinion of this writer), I deem it appropriate to set forth my reasons for joining in the dismissal of the writ as improvidently granted.

The Federal-Aid Highway Act of 1968 provided in pertinent part that:

> "The Secretary [of Transportation] shall not approve any project [such as that here involved] which will cause the displacement of any person . . . unless he receives satisfactory assurances from the State Highway department that—
>
> "(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment." 23 U. S. C. § 502 (1964 ed., Supp. V).

The principal issue presented by this case is whether that statute, either of its own force or together with the administrative regulations promulgated pursuant to it, prevents the Secretary from authorizing construction of a segment of the interstate highway system, even where the rights-of-way had been acquired and some persons displaced prior to the effective date of the 1968 Act, unless the State first compiles a comprehensive formal relocation plan. In short, the question is what constitutes "satisfactory assurances" in such a case.

Since certiorari was granted, a number of events have occurred that, in my judgment, have rendered this case wholly inappropriate for our review. First, the Act upon which petitioners base their case has been repealed. Secondly, a new statute has been enacted by the Congress

that alters drastically the potential impact of any decision we might reach in this case. Third, we were informed that, as of the date of oral argument, less than 10 persons remained to be displaced by this federal project. Finally, in their brief on the merits in this Court, petitioners have almost completely abandoned their original claim for relief and now seek to broaden substantially the nature of the remedy they seek.

The original prayer for relief simply sought to enjoin further displacement pending submission and implementation of a formal relocation plan by the West Virginia State Highway Department. The fact that the statute has been repealed since certiorari was granted and that less than 10 persons would be affected were we to accept petitioners' legal position renders this case, I think, a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import. Of course, every individual alleging he has been abused by the exercise of federal power should, as a general matter, be heard, even where his situation becomes unique due to repeal or cessation of the action he challenges. That is why federal district courts and courts of appeals are provided and vested with largely obligatory jurisdiction. Hearing such claims is not, however, a principal purpose for which this Court sits. See Rule 19 of the Rules of this Court.

At the same time Congress repealed the 1968 Act it enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 84 Stat. 1894. Its principal purpose, as the title implies, was to establish a uniform governing rule of federal law for all federally directed and federally financed projects that cause displacement of persons and businesses. The 1970 Act was very consciously modeled on the 1968 Federal-Aid Highway Act, following "as closely as possible [its] substantive provisions," S. Rep. No. 91–488 (1969), in an

effort to assure that all persons uprooted by federal authority would receive the beneficent protection earlier extended to those situated in the path of highway construction. See especially 115 Cong. Rec. 31535 (remarks of Sen. Cooper). Section 210 of the new Act provides that:

> "[T]he head of a Federal agency shall not approve any grant to . . . a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such State agency that—
>
> . . . . . .
>
> "(2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;
>
> "(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205 (c)(3)."

Section 205 (c)(3) describes in some detail the services that must be provided. It does not, however, explicitly state that such "program" shall include a comprehensive plan reflecting the projected relocation of each individual affected.

Arguably, the presence of this provision would enhance the general significance of our construction of the relevant,[1] and similarly worded, section of the 1968 Act.

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[1] The 1968 Act is still the relevant focus of this class action. The 1970 Act did not become effective until January 1971, and it specifically preserves rights and liabilities existing under prior Acts. § 220 (b). Those petitioners not relocated prior to the effective date of the 1970 Act may have a claim under the latter statute as well.

Indeed, my Brother DOUGLAS asserts that "any necessary interpretation of the 1968 [Act] would be equally applicable to the 1970 Act." *Post*, at 504, n. 1. For me, however, this does not increase, but rather further diminishes, the appropriateness of our ruling in the instant case.

This case comes to us on a record that sheds light only upon the proper construction of the 1968 Act which governed only federal programs, administered by one agency, that aid highway construction by the States. It now appears that anything we might hold in that regard may very well have to be carried over in full force to govern the administration of the large number of federal programs that bring about human displacement. To render our determination upon such a wide-ranging issue we should, at a minimum, have the benefit of the thinking of lower federal courts on this problem, as well as some knowledge of the responses of the various affected agencies to this new statute. Yet we are entirely without these essential aids.

To the extent, then, that the instant case has any significance for the future, it seems to me that such issues should await a case arising under the new statute. Insofar as the case can be said to present an issue only as to the proper construction of the 1968 Act, events subsequent to the granting of the writ have, as noted previously, robbed it of all national significance.

Finally, it is troublesome that petitioners have virtually abandoned their initial claim for relief. Instead of the preparation of a plan,[2] they now seek a decree to the effect that the District Court should bring before it all

[2] Petitioners have not wholly abandoned their original claim for relief. They argue that preparation of a plan "may be appropriate relief" for those not yet relocated. Petitioners' Brief 51. Prime emphasis, however, is placed upon the new remedial technique described in the text.

persons displaced by the highway and inquire whether their new locations meet statutory standards. As to this issue, there is neither an opinion below nor a record upon which to judge the claim. The case was tried upon a theory that the statutes require a formal plan, not that numerous individuals had been improperly relocated in fact. And there would seem to be no bar to the initiation of subsequent proceedings, in the District Court, raising individual claims of this sort where they do exist.

In light of this changed posture of the case, I do not think its adjudication would be a provident expenditure of the energies of the Court. Cf. *Sanks* v. *Georgia*, 401 U. S. 144 (1971).

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL concur, dissenting.

This case involves two federal-aid interstate highway projects in Charleston, West Virginia. Charleston lies in a narrow valley, along the Kanawha River and is bisected on the east by the Elk River which joins the Kanawha near the center of the city. The Triangle district is located along the south side of the Elk and near its mouth. Many of the residents of the Triangle district are elderly and almost all have comparatively low income. As often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live.

The common urban housing shortage is severe in Charleston, in part, because many homes have been demolished for public projects. The impact of public projects in the Triangle has been exceptionally severe. Land clearance for a proposed expansion of a local water company displaced some 243 persons a few years ago. The planned interstate highway will displace about 300 more.

And a proposed urban renewal project (which has been postponed indefinitely because of lack of replacement housing) will displace almost all of the area's 2,000 residents.

Although alternative routes for the interstate highway were considered, the route through Triangle was selected and approved in 1964. Federal authorization for the right-of-way was given in 1966 and 1967. There were about 300 persons to be dislocated within Triangle.

On August 23, 1968, the 1968 amendments to the Federal-Aid Highway Act relating to relocation benefits for persons displaced by federal-aid highways became effective. By that date some 60% of the proposed right-of-way in the present case had been acquired by the State. But the vast majority of persons within the Triangle area, who were to be dislocated by the highway, had not yet been displaced from the area as of the effective date of the 1968 amendments.

Just over three months after the 1968 amendments became effective petitioners commenced this action arguing that the amendments had not been complied with and that there was no state plan disclosing the existence of adequate replacement housing. Prior to trial only 17 households had been moved and over 280 persons remained to be displaced. Once the construction began, however, displacement did occur and the Solicitor General's brief, filed just before oral argument, informs us that only nine persons are left in the Triangle and virtually all the vacant housing has been demolished pursuant to an order of Under Secretary of Transportation Beggs given November 6, 1970.

Much is made of the fact that although originally about 300 people were to be displaced in the Triangle, there remain only nine who have not been taken care of or who have not on their own found new shelter. If only one person were involved, the case would, in my

view, be no different. For under our regime even one person can call a halt where government acts lawlessly. And this is patently a case where the federal bureaucracy has defied a congressional mandate.

It is notorious that interstate highways have left displaced citizens without homes because no efforts or inadequate efforts have been made for relocation. In 1962 Congress amended the Federal-Aid Highway Act to require assurances of "relocation advisory assistance" and authorized minimal payments for relocation assistance. 23 U. S. C. § 133 (repealed by Pub. L. 90–495, § 37, 82 Stat. 836). But, as Judge Sobeloff noted below, the "cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal." 429 F. 2d 423, 424 (dissenting opinion). In 1968 Congress passed certain amendments to the Act to rectify this "national scandal." [1]

The 1968 amendments provide that any person displaced by a federal-aid highway project "may elect to receive actual reasonable expenses in moving." 23 U. S. C. § 505 (1964 ed., Supp. V).[2] If a property owner, he is entitled to a payment from the State, in addition to the acquisition price of the property taken, of up to $5,000, representing the difference between the acquisition price and the cost of obtaining a comparable dwelling. A tenant may receive up to $1,500 to enable him to rent for a period of two years, or make the down payment on the purchase of a decent, safe, and sanitary

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[1] It is true, of course, that the 1968 amendments were repealed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894. That Act, however, is so similar to the 1968 amendments that any necessary interpretation of the 1968 amendments would be equally applicable to the 1970 Act. For convenience I have provided parallel citations in the footnotes.

[2] Cf. § 202 of the 1970 Act.

dwelling "not . . . less desirable" than his existing one. 23 U. S. C. § 506 (1964 ed., Supp. V).[3]

The duty of the Secretary of Transportation under the amendments was made explicit. He is to see the amendments are effective. Under 23 U. S. C. § 502 (1964 ed., Supp. V)[4] he is not to approve any project "which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State Highway department that" (1) fair and reasonable relocation and other payments will be afforded in accordance with the Act, (2) relocation assistance programs will be afforded in accordance with the Act and (3) "within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced,

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[3] Cf. §§ 203 and 204 of the 1970 Act. The payments are substantially higher under the new Act.

[4] Cf. § 210 of the 1970 Act: "Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such State agency that—

"(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 of this title;

"(2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;

"(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205 (c) (3)."

Section 205 (c) (3) of the 1970 Act is virtually identical to § 502 (3) mentioned *infra* in the textual paragraph.

decent, safe, and sanitary dwellings . . . equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment."

Satisfactory assurances have been strictly defined by regulation. Instructional Memorandum 80–1–68, § 5a (5) of the Department of Transportation requires that the program be "realistic." "The State highway department, prior to proceeding with . . . construction shall furnish . . . information for review and approval by the division engineer [concerning methods] *by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing* [*and the methods*] *by which the State will . . . inventory . . . currently available comparable housing.*" (Italics added.) *Id.*, at § 7b. Instructional Memorandum 80–1–68 was issued on September 5, 1968, § 5b of which stated that "assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum." [5] Even with this restriction, the memorandum would apply to this case since construction was not authorized until the fall of 1969.

The route for the highway was approved in 1964 and approval for acquisition of right-of-way was given in both 1966 and 1967. In early 1968 the Director of Public Roads issued a memorandum to his regional and state administrators directing that relocation problems be con-

[5] The Secretary, however, has subsequently changed that position and the memorandum now applies to all approvals of construction. See Memorandum of Secretary of Transportation: Implementation of Replacement Housing Policy, January 15, 1970; Federal Highway Administration Circular Memorandum: Relocation Assistance—Availability of Replacement Housing, March 27, 1970.

sidered more extensively. A state plan for Charleston was reviewed and a federal division engineer stated:

> "In the Charleston area the State did secure valuable information relative to persons to be dislocated by a survey which was a valuable assist in defining the overall problem involved. It would not be considered, in our opinion, a complete relocation plan since it did not provide information either factual, estimated or projected as to the availability of replacement housing."

Since there was no need for a relocation plan at all, the division engineer felt that the "half of a plan" of the State was to their credit. Then on August 23, 1968, the 1968 amendments became effective. Section 511 (3) (1964 ed., Supp. V) [6] provided that a displaced person was "any person who moves from real property on or after the effective date of this chapter" as a result of acquisition for a federal-aid highway.

The Secretary did not require the State to comply with the requirements of § 502. Yet as of the effective date of the 1968 amendments there had been no authorization of construction and at least 280 persons remained in the project area to be dislocated. The State finally did prepare a relocation plan, but only in response to this lawsuit and while the federal officials have obtained a copy of it, we are told they have made no attempt to review it. The plan that was prepared does not consider competing and simultaneous needs of other displaced persons because competition was not considered relevant. No formal plan for relocation was submitted to the division engineer because of the administrative interpretation that if authorization to acquire right-of-way had been

[6] § 101 (6) of the 1970 Act.

given prior to August 23, 1968, then the 1968 amendments were of no effect. Subsequent to the District Court order dismissing petitioners' complaint construction was authorized.

This petition should not be dismissed as improvidently granted. Our "rule of four"[1] allows any four Justices to vote to grant certiorari and set the case for consideration on the merits. The four who now dissent were the only ones to vote to grant the petition. The rule should not be changed to a "rule of five" by actions of the five Justices who originally opposed certiorari. It is improper for them to dismiss the case after oral argument unless one of the four who voted to grant moves so to do, which has not occurred here. As MR. JUSTICE HARLAN has noted it would save time and money if the five would dismiss as improvidently granted immediately after the case is granted rather than waiting for briefs and oral argument. *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 560 (separate opinion). As JUSTICE HARLAN's opinion in *Ferguson* makes clear, it is the duty of the five opposing certiorari to persuade others at Conference, but, failing that, to vote on the merits of the case. *Id.*, at 562. His advice should be heeded here, lest the integrity of the "rule of four" be impaired.

I therefore dissent from a dismissal of this petition.

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[1] The problem is an old and recurring one. Mr. Justice Frankfurter took the position that even the five who voted to deny the petition can, after oral argument, properly dismiss the writ as improvidently granted. *United States* v. *Shannon*, 342 U. S. 288, 294–297. But I thought then—and still think—that such a practice impairs "the integrity of our certiorari jurisdiction." *Id.*, at 298.

"By long practice—announced to the Congress and well-known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari. If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired." *Ibid.*